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The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials

ROBERT N. CLINTON*

INTRODUCTION

Many of the protections for criminal defendants enumerated in the fifth and sixth amendments to the United States Constitution are addressed to the defendant's rights at trial. Yet, strikingly, there is no clearcut statement in the Bill of Rights or elsewhere in the United States Constitution guaranteeing the accused a right to present his defense at trial. The sixth amendment gives the defendant the right "to have the Assistance of Counsel for his defence" and the availability of "compulsory process for obtaining witnesses in his favor." Thus, it assumes the presentation of some sort of defense on the part of the defendant. While the compulsory process clause of the sixth amendment assures a means of compelling the attendance of witnesses, it does not expressly grant the right to present their testimony. Was that omission deliberate? Was the right to present a defense so obvious that it was assumed? Did the Framers intend the fifth and sixth amendments to grant a right to present a defense? Does any such right exist?

Increasingly, developments since the adoption of the Bill of Rights have posed new evidentiary and procedural obstacles which effectively hinder or preclude criminal defendants from presenting certain evidence in support of a defense. As evidentiary rules became more formalized during the nineteenth century, criminal judges frequently excluded on technical evidentiary grounds portions of the accused's case which were arguably material and vital to his defense. Similarly, procedural formalization during the twentieth century has had the effect of posing new obstacles to the presentation of the defense case. For example, alibi-notice rules and statutes¹ have utilized exclusion of defense testimony as a sanction for procedural default; and, despite the Supreme Court's repeated reservations of the constitutionality of such exclusions,² the recently adopted Federal Rules of Criminal Pro-

*Associate Professor of Law, University of Iowa College of Law. B.A., University of Michigan, 1968; J.D., University of Chicago, 1971.

¹The first alibi-notice statute was adopted in Michigan in 1927. Mich. Pub. Act No. 175, ch. 8 (1927) (codified at MICH. COMP. LAWS ANN. §§ 768.20-.21 (1968)).

²See, e.g., *Wardius v. Oregon*, 412 U.S. 470, 474 n.6 (1973); *Williams v. Florida*, 339 U.S. 78, 83 n.14 (1970). But cf. *Nobles v. United States*, 422 U.S. 225, 241 (1975).

cedure also utilize this "preclusion sanction" for procedural defaults in discovery orders and for failure to supply pretrial notice on various matters.³

The Framers of the Bill of Rights never envisioned the development of these difficulties and therefore did not provide express protections against them. While American constitutional law during the past two decades has become increasingly concerned with criminal procedures relating to subjects such as confessions, search and seizure, and self-incrimination, this constitutional revolution in criminal law has not experienced a concomitant analytical development of protections designed to facilitate the accused's ability to present evidence and witnesses favorable to his defense. Most of the cases in the recent revolution in criminal procedure provide restraints on evidence and procedure which may be employed by the government *against* the criminal defendant rather than loosening the restraints on evidence and procedure which may be employed by a defendant in his own behalf.

This lack of theoretical development of a right to present a defense is not the result of a lack of opportunity for the judiciary. The United States Supreme Court has had occasion to review many cases which touch on this issue⁴ and yet has rarely suggested that the criminal defendant has a right to present his defense or explained the appropriate test to be applied to such a guarantee.⁵ Instead, the Court has usually treated each case as *sui generis* and has often chosen to ground its decisions on one of the specific guarantees in the fifth and sixth amendments, thereby straining, often beyond recognition, the language of many of the substantive guarantees involved.⁶ Thus, little theoretical growth has taken place with respect to assuring a right to present a defense.

It is the purpose of this Article to attempt to analyze such decisions and the historical developments from which they emerged and thereby to suggest that there is a federally protected constitutional right of an accused to present a defense. This Article will delineate the contours and implications of this right and will provide a new framework in which to analyze problems of criminal procedure relative to exclusion of defense evidence. As with many

³FED. R. CRIM. P. 12.1.

⁴See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Washington v. Texas*, 388 U.S. 14 (1967); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *In re Oliver*, 333 U.S. 257 (1948).

⁵But see *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has a right to present his own witnesses to establish a defense.").

⁶See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

constitutional quests, the appropriate starting point is an analysis of the historical context in which the Bill of Rights guarantees were adopted. Of particular interest is the development of the criminal trial from the standpoint of the accused's ability to present testimony and witnesses in his defense. Such an analysis is crucial to understanding the spirit in which the fifth and sixth amendments' guarantees were proposed and adopted.

I. THE DEVELOPMENT OF THE CRIMINAL TRIAL FROM THE DEFENSE VIEWPOINT

A. *The English Common Law Experience*

Under early Anglo-Saxon law, the defendant was not entitled to a trial if apprehended in the criminal act, but was subject to summary punishment.⁷ If not "caught in the act," the defendant was convicted by mere accusation unless he could muster a specified number of compurgators to swear on oath to his innocence.⁸ The number of compurgators required was at least as numerous as the number of persons who swore to his guilt.⁹ Thus, these early English trials, conducted in hundred court or liet court, were mere swearing contests, often based on reputation, with no evidence presented in any formal sense.¹⁰ The court served only the ministerial function of assuring that each compurgator was sworn. There was no weighing of evidence—only a counting of heads, and the court had little control over the whole process.¹¹

After the Norman Conquest in England, criminal procedure began to take on new forms. There were essentially two forms of trial at this time, depending on whether there was a specific accuser or the accusation was made by "common report" of the community.¹² If there was an accuser, the defendant had the right to an "appeal." The "appeal" resulted in a trial by battle between the accused and his accuser unless the evidence against the accused, presented at a preliminary stage of the proceedings, was so strong as to remove all doubt as to the defendant's guilt. In the latter case, the defendant had no right to an "appeal" and

⁷1 J. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 8-9 (2d ed. 1890) [hereinafter cited as STEPHEN, GENERAL VIEW].

⁸*Id.* at 11.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* Interestingly, the early English apparently had little faith in the accuracy of their own trial mechanism since the punishment for conviction at such a trial by compurgators was usually only indemnification of the person injured (with the possibility of punishment upon default). *Id.*

¹²*Id.* at 16-17.

was summarily executed.¹³ Neither the appeal nor the common report afforded the defendant an opportunity to present evidence. On the other hand, if the accusation was by common report, Norman law allowed a trial by jury in which the jurors were both the witnesses and the triers of fact. The jurors apparently tried the defendant based on all information available to them, presumably including his reputation.¹⁴ Trial by ordeal was also used in connection with a cause begun by common report.¹⁵

The criminal trial based on the presentation of evidence by witnesses apparently began to take form during the reign of Queen Mary¹⁶ and experienced a painfully slow growth and evolution which has continued into the twentieth century. Unfortunately, the history of that evolution is sketchy because no series of comprehensive reports of the trials survive. Indeed, much of the history available is based almost exclusively on one source—the reports in *State Trials*.¹⁷ These reports deal primarily with important cases in English history, most of which involved political crimes. Thus, these reports do not reflect, and in fact little is known until the eighteenth century, of the fashion in which the average criminal trial was conducted in the outlying counties in England.¹⁸

From the available data, it appears that the criminal trial based on the testimony of witnesses and the presentation of evidence (at least for the Crown) began sometime between 1477 and 1544. Judge Stephen notes that the available records of the trial of Sir Thomas More in 1535 reflect the presentation of some evidence and testimony.¹⁹ The rudiments of the modern trial seem to have emerged by that date.

From the sixteenth century on, the record is somewhat clearer, although it is still based on notorious political cases. The sixteenth century criminal trial seems to have been a proceeding substantially oriented to the advantage of the Crown since the defendant had minimal opportunity to present any defense. In a felony case, the defendant was denied the assistance of counsel and was refused

¹³Id. at 20-21. See also 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 244-72 (1883) [hereinafter cited as STEPHEN, HISTORY]. The appeal fell into disuse in England after the lessening of the Norman influence, but it was not formally abolished until 1819. STEPHEN, GENERAL VIEW, *supra* note 7, at 21.

¹⁴STEPHEN, GENERAL VIEW, *supra* note 7, at 16; 1 STEPHEN, HISTORY, *supra* note 13, at 254-60.

¹⁵1 STEPHEN, HISTORY, *supra* note 13, at 255-58.

¹⁶Id. at 304.

¹⁷Id. at 319 n.1.

¹⁸See generally J. COCKBURN, HISTORY OF ENGLISH ASSIZES 1558-1714, at 125 (1972).

¹⁹1 STEPHEN, HISTORY, *supra* note 13, at 320-24.

a copy of the indictment on which he was to be tried.²⁰ The Crown was permitted to call witnesses, but the defendant had no absolute right to call any witnesses or present any evidence in his own behalf.²¹ The accused could address the jury personally, but that right was virtually the only manner in which he could defend himself. Indeed, that right to address the jury often was not terribly useful since the accused, without access to the indictment, might not even know the reason for his indictment prior to the trial.²² However, the accused was generally given a free rein in his address to the jury²³ since rules of evidence and concepts of materiality had not yet developed to impede the accused's arguments and protestations of innocence to the jury.²⁴ The trial of this period was relatively free form. For example, the defendant often answered the Crown's witnesses as they testified or immediately thereafter—a practice which fell into disuse in the seventeenth century.²⁵

The origin of and the justification for the pro-prosecution procedures of the sixteenth and early seventeenth century English criminal trial remain somewhat obscure. The accused apparently could not receive a copy of the indictment because in form it was styled as a presentment to the Crown.²⁶ Seemingly, the defendant was denied counsel because it was the prosecutor's duty to prove the Crown's case so completely that no defense was possible.²⁷ While this rationale may also have supported the refusal to permit the defendant to present witnesses in his own behalf, the possibility also exists that no defense witnesses were permitted because it was thought unseemly, if not treasonous, to allow anyone to be a witness against the Crown—a sublime elevation of form over substance.²⁸

Two cases in the second half of the sixteenth century effectively illustrate the nature of the criminal trial of those times. In *Throckmorton's Case*,²⁹ the defendant, accused of treason, requested that a witness named John FitzWilliams be called and sworn in his behalf. The court refused the request and instructed

²⁰ W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 224 (3d ed. 1944) [hereinafter cited as HOLDSWORTH].

²¹ *Id.*

²² *Id.*

²³ *Id.* at 229. See also 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 575, at 684 (3d ed. 1940) [hereinafter cited as WIGMORE].

²⁴ 5 HOLDSWORTH, *supra* note 20, at 183.

²⁵ *id.* at 233.

²⁶ *id.* at 615 (5th ed. 1942).

²⁷ *id.* at 192 (3d ed. 1944).

²⁸ See notes 31-32 and accompanying text *infra*.

²⁹ *Trial of Nicholas Throckmorton*, 1 COMPLETE COLLECTION OF STATE

the witness to go on his way. All the defendant was allowed to do during this trial was to question or respond to the Crown's witnesses and to address the jury before it retired. Similarly, in *Udall's Case*,³⁰ the accused offered certain witnesses in his felony trial. The report of the case indicates that the following exchange occurred when the witnesses were offered:

And further, if it please you, my lords, here are some witnesses that upon their oaths will testify how diversely [a Crown witness] hath reported of his confession to this thing, if it please your lordship to accept them. And the witnesses offering themselves to be heard, were answered that because their witness was against the queen's majesty, they could not be heard.³¹

Remarkably, when Udall was later before the court for sentencing and apparently moved to arrest the judgment, the court was again confronted with the same evidence and responded by asking Udall why he had not pled the matters which he was then raising to the jury. Udall unsuccessfully answered:

I did so; and offered to produce sufficient proof for it; but your lordships answered that no witnesses might be heard in my behalf, seeing it was against the queen; which seemeth strange to me, for methinks it should be for the queen to hear all things on both sides, especially when the life of any of her subjects is in question.³²

Apparently this substantial lack of balance and fairness in the English criminal trial began to concern English jurists and citizens during the late sixteenth century and increased rapidly until the middle of the seventeenth century. This rising concern with criminal procedure appears to be the direct result of judicial excesses, particularly in treason trials, which had affected a wide range of English society.³³ Thus, English procedure began to change during the seventeenth century.

Legislative efforts were made to cure the summary nature of criminal proceedings toward the end of the sixteenth century and the beginning of the seventeenth. The first efforts to attack the problem occurred haphazardly. Thus, a 1589 statute entitled "An act against the embezzling of armour, habiliments of war and victual" provided that in a trial for that crime, the defendant was permitted "to make any lawful proof that he can,

TRIALS 869 (Guildhall 1554).

³⁰*Trial of John Udall*, *id.* at 1271 (Croydon assizes 1590).

³¹*Id.* at 1281.

³²*Id.* at 1304.

³³Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 88 (1974).

by lawful witnesses or otherwise, for his discharge and defense in that behalf, any law to the contrary notwithstanding.³⁴ Of course, this provision permitting the presentation of witnesses did not fully comport with then contemporary court practice. A statute adopted in 1606 in order to reconcile certain hostilities between England and Scotland, provided that in trials of English subjects for crimes committed in Scotland, witnesses were to be allowed for the accused, and such witnesses could testify under oath.³⁵ Thus, not only could the defendant's witnesses in such a case give testimony, but they could also be sworn—a further departure from English procedure of that time. The attack on the restrictions on an accused's ability to defend himself thus was begun by ad hoc parliamentary efforts to change the prevailing court rules.

The dissatisfaction with the rules precluding the defendant from presenting witnesses was also felt in the courts, and consequently the sixteenth and seventeenth centuries saw a slow growth in the willingness of English courts to hear defendants' witnesses.³⁶ At first, there were various restrictions on the accused's privilege of presenting witnesses. One restriction was that defense witnesses could only adduce facts inconsistent with guilt³⁷ rather than directly contradict the Crown's witnesses.³⁸ Another important, although possibly formal, restriction was the fact that, initially, such witnesses could not, unlike the Crown's witnesses, be sworn.³⁹ However, the criminal practice continued to evolve, and by the seventeenth century, the taking of sworn

³⁴31 Eliz. 1, c. 4, § 2 (1589) (emphasis added).

³⁵4 Jac. 1, c. 1 (1606). Blackstone commented on this statute as follows: The House of Commons were so sensible of this absurdity [refusing the defendant witnesses in his behalf] that in the bill for abolishing hostilities between England and Scotland when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause and carried it against the efforts of both the Crown and the House of Lords, against the practice of the courts in England and the express law of Scotland, "that in all such trials, for the better discovery of the truth, and the better information [as above], there shall be allowed unto the party so arraigned the benefit of such witnesses, only to be examined upon oath, that can be produced for his better clearing and justification as hereafter in this Act are permitted and allowed."

⁴ BLACKSTONE, COMMENTARIES *360, quoted in J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 159 n.4 (Kelley ed. 1969). This statute apparently had a long history. Pickering Statutes notes that it was altered by 7 Jac. 1, c. 1 (1909), revised and enforced by 13 & 14 Car. 2, c. 22 (1662), and abrogated in 5 Anne, c. 8 (1706).

³⁶9 HOLDSWORTH, *supra* note 20, at 224.

³⁷E.g., alibi, self-defense, or that a person supposed dead was alive.

³⁸5 HOLDSWORTH, *supra* note 20, at 175.

³⁹*Id.*

testimony from the defense witnesses had apparently taken root. Nevertheless, the defendant still had no formal means available to compel his witnesses' attendance or ascertain what testimony they would have given when unable to attend.

The turn of the eighteenth century saw a rapid expansion of defendants' rights and a rapid movement toward a trial mechanism more evenly balanced between the Crown and the accused. In 1695, Parliament enacted a statute⁴⁰ which, in cases of treason and related crimes, gave defendants the following rights: (1) the right to secure a copy of the indictment upon payment of the prescribed fee, albeit without the names of the Crown's witnesses, which were usually endorsed on the indictment, in order "to advise with counsel thereupon, to plead and make their defense"; (2) the right to counsel, apparently including assigned counsel; (3) the right to produce witnesses and have them heard under oath; (4) the right of compulsory process to compel the attendance of witnesses; (5) the right to limit evidence of the overt treasonous act to that specified in the indictment;⁴¹ and (6) the right to have a list of the panel of jurors two days in advance of trial. This expansion of defendants' trial opportunities continued in 1701 when Parliament passed a statute⁴² which granted the criminal defendant in any felony trial the right to have witnesses give testimony under oath in his behalf.

Yet, during the eighteenth century, defendants in England who were not charged with treason and related crimes still had no statutory right to have their defense presented by counsel,⁴³ no right to compel the attendance of witnesses, no right to a copy of the indictment, and no right to give sworn testimony in their own behalf, although they could always address the jury.⁴⁴ Most of these difficulties continued in English practice into the nineteenth century.

⁴⁰7 Will. 3, c. 3 §§ 5.1, 7, 9 (1695).

⁴¹Apparently this provision was designed to enable the defendant to adequately prepare his defense.

⁴²1 Anne. 1, c. 9, §§ 3, 5 (1701).

⁴³England finally gave all defendants a right to have counsel present their defense in the Prisoners' Counsel Act of 1836. 6 & 7 Will. 4, c. 114, § 2 (1836). Accused misdemeanants had traditionally had the right to counsel at trial. 1 STEPHEN, HISTORY, *supra* note 13, at 341; 2 HOLDSWORTH, *supra* note 20, at 312 (4th ed. 1936).

⁴⁴The defendant was not fully competent to testify in his own behalf in England until 1898. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 324 (1968) [hereinafter cited as LEVY]. However, various methods of permitting the defendant to testify, including separate examination by a magistrate, apparently became current during the 19th century. These methods are well summarized, together with relevant statutory citations, in 1 STEPHEN, HISTORY, *supra* note 13, at 440-41.

Other aspects of the English practice which favored the Crown continued even during the eighteenth century. For example, the trial of a defendant held in custody took place immediately following the arraignment. The speed of the trial was particularly advantageous to the Crown since the defendant charged with a felony other than treason and related crimes, would not have access to the indictment before arraignment and, therefore, would not be fully conversant with the exact nature of the charge until he was tried.⁴⁵ Immediate trial following arraignment thus prevented the presentation of a full defense.⁴⁶

Another English practice which ran counter to the notions of a balanced trial procedure was the summary conviction. By statute,⁴⁷ a defendant who refused to plead could be summarily convicted. Similarly, under eighteenth century English practice, a defendant who filed a demurrer admitted the facts of the indictment, just as in a civil case; if he was overruled, he could not plead over but was summarily convicted.⁴⁸

However, some tendency was evident in English court practice during the eighteenth century to ameliorate some of the rigors of these unbalanced procedures for felony trials. For example, by the time of the American Revolution, it was not uncommon to permit counsel to question and cross-examine witnesses on the defendant's behalf; the only limitation was that counsel could not directly address the jury.⁴⁹ Even though eighteenth century English law continued to preclude the accused from testifying on his own behalf, he was allowed to address the jurors freely in his summation, and his statements, while tech-

⁴⁵J. GOEBEL, JR. & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 610-11 (1944) [hereinafter cited as GOEBEL & NAUGHTON].

⁴⁶However, the practice in England at Quarter Sessions was to have the defendant, if he was a resident of the area, plead in one session of court and to try the case in the ensuing session unless there was consent to an immediate disposition. While the judges of Oyer and Terminer and Gaol Delivery had the power to compel immediate trial, the practice at the Assizes paralleled that of Quarter Sessions. *Id.* at 611. The practice in King's Bench was that a nonresident defendant had to be given advance notice of when his trial was to take place. *Id.* citing Rules and Orders of King's Bench (2d ed. 1747), Mich. 4 Anne, note c and 14 Geo. 2, c. 17, § 4. Accordingly, there was some delay which permitted a modicum of preparation.

⁴⁷12 Geo. 3, c. 20, § 1 (1772).

⁴⁸GOEBEL & NAUGHTON, *supra* note 45, at 598, citing COKE, SECOND INSTITUTES 178. Apparently Sergeant Hawkins, writing in 1724, cast some doubt on the validity of this rule in felony cases, 2 W. HAWKINS PLEAS OF THE CROWN c. 69, § 3 (7th Ed. 1795). However, Blackstone disregarded Hawkins and urged the propriety of the rule. 4 BLACKSTONE, COMMENTARIES *334.

⁴⁹LEVY, *supra* note 41, at, 322-23. Yet as late as 1760, Stephen finds a defendant being denied the assistance of counsel despite the fact that his defense was insanity. STEPHEN, GENERAL VIEW, *supra* note 7, at 46.

nically not evidence, were entitled to the jurors' full consideration.⁵⁰

In short, with some exceptions, the trend in the English criminal trial as it emerged in the late eighteenth century was one of balance. Increasing stress was placed on the right of the defendant to fully prepare and present his defense. Professor Levy summed up the tone of the eighteenth century English criminal trial and the status during this period of the accused's rights as follows:

Accordingly, by the early eighteenth century both judicial and statutory alterations in procedure made it possible for a defendant to present his defense through witnesses and by counsel. As a result, though he always retained his right to address the court unsworn at the close of trial, and to range freely over any matters of his choice, he was no longer obliged to speak out personally in order to get his story before the jury, to rebut incriminating evidence, or to answer accusations by the prosecution.⁵¹

B. Colonial Practice

As hazy as the picture of English criminal procedure is for the sixteenth, seventeenth, and eighteenth centuries, the outline

⁵⁰STEPHEN, GENERAL VIEW, *supra* note 7, at 187. The history of the defendant's disqualification from testifying in his own behalf is a rather remarkable one. Stephen suggests that the accused was commonly questioned by the court and sometimes by the Crown's attorney until the Revolution of 1688. *Id.* at 186; STEPHEN, HISTORY, *supra* note 13, at 325-26. This comports with the relatively free-form fashion in which the criminal trial was conducted until approximately the 18th century. As procedures became more rigid and rules of evidence slowly crept into the proceedings, the interest disqualification was applied to criminal as well as civil trials. However, in England and in the United States, this interest disqualification was last abolished in the criminal arena. See generally 2 WIGMORE, *supra* note 23, §§ 575-80.

Of the testimonial disqualification of the criminal defendant on the ground of interest, Stephen wrote:

It is remarkable that this omission, which is one of the most characteristic peculiarities of the English system of procedure, owes its origin to nothing else than recent practice. It rests upon no express authority, and no general principle judicially laid down.

The modern practice is not older than the Revolution.

STEPHEN, GENERAL VIEW, *supra* note 7, at 191. Levy suggests that the testimonial disqualification of the accused arose from the fact that his testimony would have been to his numerical advantage under the Anglo-Saxon trial practice of merely counting the number of compurgators. LEVY, *supra* note 44, at 324. However, Stephen's statement of the history of the rule suggests that it arose at least 600 years after the trial by compurgators had fallen into disuse in England.

⁵¹LEVY, *supra* note 44, at 323.

of the early American colonial experience is even less clear. Despite the fact that many of the early colonists had fled England to avoid persecution, they appear to have made little effort to improve on English criminal procedure.⁵² The colonists regarded themselves as having all the rights of Englishmen, and, therefore, tried to perpetuate the criminal procedure used in their mother-land.⁵³

However, as the early New York cases demonstrate, innovation did in fact occur, probably because the early colonists lacked detailed familiarity with English procedure. Thus, the first reports of trials in New York at the 1665 Assizes reveal that the defendants were not permitted to challenge the jury panel, that the evidence was presented solely in written form, and that the defendant was permitted to examine the evidence before entering his plea.⁵⁴ These earliest New York reports also reflect no effort to present any testimony for the defense,⁵⁵ apparently because the accused assumed that such testimony would not be heard.⁵⁶ In later New York trials in 1669 and 1675, witnesses were called for the defendant but, as in English practice of the period, they were not sworn.⁵⁷

By 1685, defense witnesses began to be sworn in misdemeanor cases in New York and, in 1686, counsel began to appear on behalf of the accused.⁵⁸ However, as in English practice of the day, defense counsel's role was often limited in felony cases to argument on points of law.⁵⁹ If no points of law were raised, no right to counsel existed.

While the evidence is sketchier regarding the seventeenth century practice in other colonies, it appears that the patterns were similar. For example, neither Maryland nor Rhode Island permitted the taking of the defendant's testimony under oath.⁶⁰ And while both Maryland and Rhode Island granted the right to

⁵²GOEBEL & NAUGHTON, *supra* note 45, at 557-58.

⁵³See, e.g., First Charter of Virginia, 1606, reprinted in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 54-61 (1971) [hereinafter cited as SCHWARTZ].

[Citizens of Virginia] shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.

Id. at 59-60.

⁵⁴GOEBEL & NAUGHTON, *supra* note 45, at 558-59.

⁵⁵*Id.* at 559.

⁵⁶Defendant's witnesses were commonly heard, although not sworn, in England during this period. See notes 29-32 *supra* and accompanying text.

⁵⁷GOEBEL & NAUGHTON, *supra* note 45, at 561.

⁵⁸*Id.* at 572.

⁵⁹*Id.* at 573-74.

⁶⁰LEVY, *supra* note 44, at 355-56.

counsel at any trial for an indictable offense in 1641 and 1669 respectively, Rhode Island limited the grant by allowing the counsel "to plead any *poynt of law* that may make for the clearing of his [the accused's] innocence."⁶¹ Massachusetts limited the right to counsel to those who found themselves "unfit to plead [their] own cause[s]."⁶²

Apparently, seventeenth century colonial practice paid only slight attention to accused's ability to present a defense. For example, in 1675 New York tried a defendant for incest despite the fact that the defendant never put in an appearance.⁶³ This practice of *ex parte* trial continued into the eighteenth century in misdemeanor cases, the failure to appear apparently being viewed as the equivalent of a confession.⁶⁴ In addition, a defendant who appeared but refused to plead was fined under early New York practice.⁶⁵ Virginia also seems to have allowed summary convic-

⁶¹*Id.* at 356.

⁶²Massachusetts Body of Liberties § 26 (1641), reprinted in 1 SCHWARTZ, *supra* note 53, at 74. Interestingly, the right set forth therein is not merely a right to counsel, but a right to have "any man" plead the defendant's case. *Id.*

⁶³GOEBEL & NAUGHTON, *supra* note 45, at 562-63. Apparently, the reason for the trial was the necessity of regularizing the confiscation of the defendant's property. *Id.* at 63.

⁶⁴*Id.* at 579-81. From 1693 to 1776, the records of the New York Supreme Court show the entry of 54 defaults; and during the period from 1691 to 1776, the New York Court of Quarter Sessions entered 17 default convictions. The supreme court previously dealt with felony and serious misdemeanors. *Id.* at 598. In the Court of Quarter Sessions, where only minor misdemeanors were tried, most cases were disposed of by a plea of guilty as reflected by the following table:

Pleas in New York Court of Quarter Sessions 1691-1776

Plea	
Guilty	248 (69%)
Not Guilty	94 (26%)
Default Conviction for Failure to Plead or Appear	17 (5%)

The comparable statistics for the New York Supreme Court *en banc* are as follows:

Pleas in the New York Supreme Court 1693-1776

Plea	
Guilty or Confession	91 (16%)
Not Guilty	429 (74%)
Default Conviction for Failure to Plead or Appear	54 (9%)
Unclear	5 (.6%)

Id. at 597 & n. 193.

⁶⁵*Id.* at 565. The English practice was to summarily convict as if by confession. See note 47 *supra* & accompanying text. It is not entirely clear whether the Colonies followed the English practice of preventing the accused from pleading over following a demurrer, thereby summarily convicting the accused if his demurrer was unsuccessful. Goebel and Naughton report only three instances of the demurrer being invoked in a criminal proceeding in

tion since it permitted the entry of an immediate death sentence on a defendant who exceeded his available peremptory challenges to the jury venire.⁶⁶

During the seventeenth century, Pennsylvania seemingly went further than the other colonies in protecting the defendant's right to present his defense. In section VI of the Pennsylvania Frame of Government of 1682, the defendant was given the right to "freely appear in [his] own way, and according to [his] own manner." Pennsylvania thus seemingly permitted a defendant to testify in his own behalf at a time when English and customary colonial practice denied such a right.⁶⁷ This provision also adopted the Maryland practice of giving defendants the right to "personally plead their own cause themselves; or, if unable, by their friends," thereby creating an implied right to counsel. Section VI of the Pennsylvania Frame of Government further assured the defendant time to marshal his defense by requiring that the complaint upon which he would be tried be served upon him not less than ten days before trial. In 1701 Pennsylvania adopted its Charter of Privileges, article V of which provided: "That all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors."⁶⁸ Defendants in Pennsylvania trials therefore were granted a right to call witnesses equivalent to English practice adopted the same year as well as an expanded right to counsel, which was not granted to Englishmen in all felony cases until the nineteenth century.⁶⁹

Eighteenth century colonial experience paid even greater attention to the accused's rights at trial. Indeed, the increasing disenchantment with English colonial rule during the latter half of the century placed considerable pressures on the colonial judiciaries and legislatures for pro-defendant reforms. As a result, in the eighteenth century some of the Colonies further reformed their laws governing the availability of counsel at trial. In 1734 the Virginia legislature granted all defendants charged with capital crimes the full right to counsel.⁷⁰ Additionally, the

early New York history. All three of the demurrers were successful, thereby precluding a resolution of the issue. GOEBEL & NAUGHTON, *supra* note 45, at 599.

⁶⁶H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 93 (1965) [hereinafter cited as RANKIN].

⁶⁷Pennsylvania Frame of Government § 6 (1682), reprinted in 1 SCHWARTZ, *supra* note 53, at 140. This provision seems to be a direct response to *Rex v. Lukeno*, 1 Dall. 5 (1762), in which a Pennsylvania court refused to permit the accused to give sworn testimony. The court stated that the issue of guilt "must be proved by indifferent witnesses." *Id.* at 6.

⁶⁸Pennsylvania Charter of Privileges § 5 (1701), reprinted in 1 SCHWARTZ, *supra* note 53, at 170-73.

⁶⁹See note 43 *supra*.

⁷⁰RANKIN, *supra* note 66, at 89. However, during the eighteenth century, the majority of Virginia criminal cases continued to be tried without the

defendant could require the sheriff to summon witnesses on his behalf just as was done for the prosecution witnesses.⁷¹ In New York and other colonies the defendant's witnesses were apparently sworn and heard during the eighteenth century. The justices' manuals of the day admonished the judges to admit evidence which went *against* the Crown as well as for it.⁷² Thus, a conscious effort was made to ameliorate the harshness of the seventeenth century procedures regarding the defendant's witnesses. Furthermore, while the accused was still not commonly advised of the indictment or permitted to see it until arraignment,⁷³ in New York there was always at least one day after arraignment for the accused to prepare for trial, and, more commonly, the trial would not be held until the next term of court.⁷⁴

However, the colonial trials of the eighteenth century were not without their pitfalls from the accused's point of view. Counsel was not fully available to all criminal defendants and was not permitted to conduct the entire trial.⁷⁵ In New York, the defendant was required to set forth his defense at the time of arraignment and thereby put the prosecution on notice of his trial strategy without the right to reciprocal discovery.⁷⁶ Hearsay evidence was also commonly admitted for and against the defendant, thereby precluding effective confrontation,⁷⁷ and summary conviction for certain procedural defaults continued into the eighteenth century.⁷⁸ Another obstacle to the presentation of the defendant's defense was his disqualification as a sworn witness in his own behalf—a carryover from English practice.⁷⁹ However, the testi-

benefit of defense counsel because of the defendants' inability to afford the services of a lawyer. *Id.* While attorneys often did appear in New York colonial criminal practice, that colony seems to have adhered to the restrictions on counsel's role which were imposed by English and seventeenth century colonial practice. GOEBEL & NAUGHTON, *supra* note 45, at 573-74. Thus, in felony cases (with the possible exception of treasonous offenses) counsel could appear only where points of law were at issue. However, where counsel did appear the procedures often became considerably more formalized. Cf. *id.* at 583-84 (written pleas during the New York colonial experience entered by counsel). And by 1766, *pro se* oral pleading had become the exception in New York. Cf. *id.* at 583.

⁷¹RANKIN, *supra* note 66, at 99.

⁷²GOEBEL & NAUGHTON, *supra* note 45, at 633.

⁷³*Id.* at 583.

⁷⁴*Id.* at 610-11.

⁷⁵*Id.* at 573-74.

⁷⁶*Id.* at 579.

⁷⁷*Id.* at 643-44.

⁷⁸Virginia had the rule which permitted summary conviction of a criminal defendant for exceeding his peremptory challenges to the jury, RANKIN, *supra* note 66, at 93, and New York permitted summary conviction for failure to appear or plead, GOEBEL & NAUGHTON, *supra* note 45, at 579-81.

⁷⁹See note 44 *supra*.

monial disqualification of the defendant was never a grave obstacle to the presentation of the defendant's case because he was always free before or during his summation to address the jurors, and they could take into consideration whatever he said in his own defense.⁸⁰ The defendant's right to address the jury was viewed as so central to his ability to defend himself that he was allowed "to range freely over any matters of his choice."⁸¹

In short, at the time of the Bill of Rights, there remained several procedural hurdles to the presentation of the accused's defense. The most significant of these were addressed in the specific guarantees of the sixth amendment—confrontation, the right to counsel, the right to compulsory process for the production of the defendant's witnesses, and the right to be informed, presumably in advance, of the nature of the accusation. In enumerating the defendant's trial difficulties under eighteenth century New York procedure, Goebel and Naughton list only three, all of which are corrected by the sixth amendment: (1) the harsh rules regarding prior access to the indictment; (2) the limited role for or deprivation of counsel; and (3) the limited subpoena privileges.⁸² Thus, the Bill of Rights guarantees appear to have alleviated all or most of the major procedural obstacles present in the late eighteenth century. After the Bill of Rights, the only continuing procedural obstacle for the accused was his own testimonial disqualification, which was not in fact a major obstruction because of the accused's right to freely and fully address the jury in his own defense.

The preceding historical survey obviously raises an important question: Were the *specific* guarantees of the fifth and sixth amendments really designed and intended, when read as a whole, to give the accused a more general constitutional right to present his defense? In short, was the intent of the Framers of the fifth and sixth amendments really a design to eliminate all the existing obstacles to the presentation of the defense case? This question is certainly of central importance to the issue of whether there is a constitutionally protected right to present a defense. Indeed,

⁸⁰The importance of the defendant's right to address the jury is shown in the judicial admonition given to one John Ury, who was charged with conspiracy and being a priest in a colonial New York trial. When Ury tried to open his defense with a speech refuting the prosecution's case, he was interrupted by the court: "Mr. Ury, if you have any witnesses to examine it is more proper you should do that now, *and make your defence afterwards.*" GOEBEL & NAUGHTON, *supra* note 45, at 660 n.203 (emphasis added). Thus, the ability of the defendant to fully and freely address the jury was viewed primarily as a right to defend himself and present his side of the case to the triers of fact.

⁸¹LEVY, *supra* note 44, at 323.

⁸²GOEBEL & NAUGHTON, *supra* note 45, at 633.

the significance of this right is explained by the fact that many of the current impediments to the accused's opportunities to defend are the product of developments which occurred *after* the ratification of the Bill of Rights, including the increasing formalization of and reliance on rules of evidence and procedure. These developments are discussed below in section III.

II. THE HISTORY OF THE FIFTH AND SIXTH AMENDMENTS

The history of the fifth and sixth amendments is, at best, vague regarding the scope of the intended protections of these guarantees. The rights afforded to the accused by the early state constitutions were somewhat varied, and the reports of the congressional debates over the fifth and sixth amendments are remarkably limited. Yet, in order to properly evaluate the spirit of these amendments, it is important to review this limited body of historical data.

A. *Early State Constitutions*

Pursuant to the call of the Second Continental Congress in May of 1776,⁸³ the former colonies began to adopt state constitutions, many of which formed models for the drafting of the United States Constitution and the Bill of Rights. The process of drafting state constitutions began in 1776 when Virginia adopted its important Declaration of Rights⁸⁴ and continued until 1783 when New Hampshire approved its Bill of Rights.⁸⁵

Most of these early state constitutions contained bills of rights, which almost invariably granted certain protections to criminal defendants. The trial rights of criminal defendants under these early constitutions were basically the same. Most of the states followed the lead of Virginia and adopted a provision similar to section 8 of the Virginia Bill of Rights:

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.⁸⁶

⁸³1 SCHWARTZ, *supra* note 53, at 228-29.

⁸⁴*Id.* at 231.

⁸⁵*Id.* at 374.

⁸⁶*Id.* at 235.

Pennsylvania,⁸⁷ Delaware,⁸⁸ Maryland,⁸⁹ North Carolina,⁹⁰ and Vermont⁹¹ adopted virtually identical provisions in their first state constitutions. New Jersey, the second state to draft a constitu-

⁸⁷Pennsylvania Declaration of Rights § 176 (1776), reprinted in 1 SCHWARTZ, *supra* note 53, at 265:

IX. That in all prosecutions for criminal offenses, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment, of his peers.

⁸⁸Delaware Declaration of Rights §14 (1776), reprinted in 1 SCHWARTZ, *supra* note 53, at 278:

Sect. 14. That in all prosecutions for criminal offences, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers or witnesses, to examine evidence on oath in his favour, and to speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

⁸⁹Maryland Declaration of Rights, art. XIX (1776), reprinted in 1 SCHWARTZ, *supra* note 53, at 282:

XIX. That, in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses, for and against him, on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

⁹⁰North Carolina Declaration of Rights, arts. VII-IX (1776), reprinted in 1 SCHWARTZ, *supra* note 53, at 287:

VII. That, in all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and shall not be compelled to give evidence against himself.

VIII. That no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment.

IX. That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

⁹¹Vermont Declaration of Rights, art. X (1776), reprinted in 1 SCHWARTZ, *supra* note 53, at 323:

X. That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel—to demand the cause and nature of his accusation—to be confronted with the witnesses—to call for evidence in his favor, and a speedy public trial, by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty; nor can be compelled to give evidence against himself; nor can any man be justly deprived of his liberty, except by the laws of the land or the judgment of his peers.

tion, chose to follow the language of the Pennsylvania colonial Frame of Government and adopted a provision which merely read, "That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."⁹² The last two states to adopt state constitutions, Massachusetts and New Hampshire, followed the Virginia pattern of enumerating specific rights but made one very significant change in language. Article 12 of the Massachusetts Declaration of Rights, adopted in 1780, read in relevant part:

No subject shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. *And every subject shall have a right to produce all proofs, that may be favorable to him;* to meet the witnesses against him face to face, and to be *fully heard in his defence* by himself, or his council, at his election.⁹³

New Hampshire's Bill of Rights was not adopted until 1783 (although a governmental charter had previously been adopted), and its protection of the accused's rights was virtually a verbatim reiteration of the Massachusetts formulation set out above.⁹⁴

Thus, the later formulations of defendants' rights in state constitutions adopted before the Federal Constitution and Bill of Rights explicitly gave the criminal defendant the right to produce all proofs that may be favorable to him. The fact that the Framers of the fifth and sixth amendments failed to include the language of the Massachusetts and New Hampshire documents or that of the Virginia Bill of Rights assuring the accused the right "to call for evidence in his favour" raises several questions about the intent of the Framers of the federal guarantees. Did the First Congress, which submitted the Bill of Rights for ratification, deliberately intend to exclude an unlimited right of the accused to defend himself? Or rather, did the Framers of the fifth and sixth amendments assume that the Virginia formulation of criminal defendants' rights was really coextensive with the Massachusetts formulation and the guarantees of the fifth and sixth amendments? To put the matter another way, did the Framers of the Bill of Rights assume that the specific enumeration of the rights of criminal defendants contained in the fifth and sixth

⁹²N. J. CONST. art. XVI (1776), reprinted in 1 SCHWARTZ, *supra* note 53, at 260.

⁹³Massachusetts Declaration of Rights, art. XII (1780), reprinted in 1 SCHWARTZ, *supra* note 53, at 342 (emphasis added).

⁹⁴New Hampshire Bill of Rights, art. XV (1733), reprinted in 1 SCHWARTZ, *supra* note 53, at 377.

amendments included, *by implication*, a "right to produce all proofs that may be favorable to him"?

B. The Background of the Fifth and Sixth Amendments

It is, of course, common knowledge that the furor in the states over the ratification of the United States Constitution of 1789 centered in great part upon the absence of a federal bill of rights similar to those found in most of the state constitutions of the day.⁹⁵ The bulk of this debate centered on noncriminal rights, such as freedom of press and religion, with scant concern for criminal trial rights other than the right to trial by jury.⁹⁶

However, the records of the New York ratifying convention indicate that some attention was paid to the issue of criminal defendants' rights. The New York convention proposed a number of amendments to the Federal Constitution, including several which specifically guaranteed rights now protected in the fourth, fifth, sixth, and eighth amendments.⁹⁷ Several other states did

⁹⁵See generally 1 & 2 SCHWARTZ, *supra* note 53, at 439-938.

⁹⁶One of the few references to criminal trial rights during these public debates is contained in the letters of Brutus, a pseudonymous Massachusetts anti-federalist:

For the security of life, in criminal prosecutions, the bills of rights of most of the States have declared, that no man shall be held to answer for a crime until he is made fully acquainted with the charge brought against him; he shall not be compelled to accuse, or furnish evidence against himself—the witnesses against him shall be brought face to face, and he shall be fully heard by himself or counsel. That it is essential to the security of life and liberty, that trial of facts be in the vicinity where they happen. Are not provisions of this kind as necessary in the general government, as in that of a particular State? The powers vested in the new Congress extend in many cases to life; they are authorized to provide for the punishment of a variety of capital crimes, and no restraint is laid upon them in its exercise, save only, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be in the State where the said crimes shall have been committed." No man is secure of a trial in the county where he is charged to have committed a crime; he may be brought from Niagara to New York, or carried from Kentucky to Richmond for trial for an offence supposed to be committed. What security is there, that a man shall be furnished with a full and plain description of the charges against him? *That he shall be allowed to produce all proof he can in his favor?* That he shall see the witnesses against him face to face, or that he shall be fully heard in his own defence by himself or counsel?

Letters of Brutus, No. II (1788), set forth in 1 SCHWARTZ, *supra* note 53, at 508 (emphasis in original). Brutus' reference to the defendant's right "to produce all proof he can in his favor" is important, but understandable in light of the fact that he was a citizen of Massachusetts which had guaranteed such a right.

⁹⁷New York Proposed Amendments to the Constitution of the United States (1788), reprinted in 2 SCHWARTZ, *supra* note 53, at 911:

the same, apparently with little debate. Thus, three of the ratifying states proposed a right to grand jury indictment;⁹⁸ three proposed guarantees against self-incrimination;⁹⁹ four proposed some sort of due process clause;¹⁰⁰ four proposed a speedy public trial provision;¹⁰¹ five suggested a guarantee of jury trial;¹⁰² and three suggested rights to confrontation, the production and availability of a defendants' witnesses, and counsel.¹⁰³

C. *Legislative History of the Fifth and Sixth Amendments*

Unfortunately, the records of the congressional debates on the Bill of Rights are sketchy, consisting primarily of summaries prepared years after the event.¹⁰⁴ What is known of the debates

That excessive Bail ought not to be required; nor excessive Fines imposed; nor Cruel or unusual Punishments inflicted.

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. But in cases of Crimes not committed within any County of any of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as the Congress shall by Law direct; which County in the two Cases last mentioned should be near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense, and should not be compelled to give Evidence against himself.

That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

Id. at 912-13.

⁹⁸Maryland, New Hampshire, and New York. 2 SCHWARTZ, *supra* note 53, table at 1167.

⁹⁹Pennsylvania, Virginia, and North Carolina. *Id.*

¹⁰⁰Pennsylvania, New York, Virginia, and North Carolina. *Id.*

¹⁰¹Pennsylvania, New York, Virginia, and North Carolina. *Id.*

¹⁰²Pennsylvania, Maryland, New York, Virginia, and North Carolina. *Id.*

¹⁰³Pennsylvania, Virginia, and North Carolina. *Id.*

¹⁰⁴The paucity of original data on the early debates of Congress is especially true of the Senate whose sessions were closed to the public until the second session of the Third Congress. 1 ANNALS OF CONG. 15-16 (1789). Most of what we know of the early debates in the House of Representatives as found in the ANNALS OF CONGRESS was compiled jointly from newspaper

suggests that the criminal trial rights now found in the fifth and sixth amendments, with the exception of the guarantee of jury trial, either were not very controversial or their language was not considered very important. Unlike the first, second and ninth amendment guarantees, which were discussed at length in Congress, the language of the fifth and sixth amendments received almost no consideration.¹⁰⁵

Although the ratification conventions of eight states requested amendments of various sorts when they ratified the Constitution, there was no groundswell of support for protection of criminal trial guarantees. In fact, most of the criminal trial guarantees relevant to the present discussion¹⁰⁶ were suggested by no more than three states: Pennsylvania, Virginia, and North Carolina.¹⁰⁷ And while the state ratification conventions had generally suggested amendments to the 1789 Constitution, Congress was slow to respond. New York and Virginia, in their frustration over the lack of congressional response, had even begun circulating a call for a new constitutional convention to amend or alter the 1789 Constitution.¹⁰⁸

It was against this background that Madison¹⁰⁹ announced in the House of Representatives on May 4, 1789, that he wished to bring the subject of amendments to the Constitution before that body.¹¹⁰ The matter was reluctantly taken up by the House on June 8, 1789, at which time Madison delivered his now famous speech¹¹¹ proposing nine separate changes in the text of the Constitution. The speech dealt generally with the necessity for amendments but did not explain the reasons underlying the changes. Madison simply proposed, *inter alia*, the following changes:

That in article 1st, section 9, between clauses 3 and 4,
be inserted these clauses, to wit:

* * *

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial

accounts and LLOYD'S CONGRESSIONAL RECORD. 2 SCHWARTZ, *supra* note 53, at 984.

¹⁰⁵See generally 2 SCHWARTZ, *supra* note 53, at 983-1167.

¹⁰⁶E.g., the right to counsel, the right to call witnesses, the right to confrontation, and the right to know the cause and nature of the accusation.

¹⁰⁷2 SCHWARTZ, *supra* note 53, table at 1167.

¹⁰⁸*Id.* at 1006.

¹⁰⁹It is also asserted that Madison proposed the Bill of Rights in order to fulfill a campaign promise to seek amendments to the Constitution. This promise was apparently made in order to forestall the effort by his anti-federalist opponent, James Monroe, to label Madison as an anti-amendment candidate. *Id.* at 984, 996-97.

¹¹⁰1 ANNALS OF CONG. 247 (1789).

¹¹¹*Id.* at 431-44.

for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * *

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.¹¹²

Nowhere in his June 8th speech did Madison discuss either the necessity for or the rationale of these particular guarantees.

The House began consideration of Madison's proposals by referring them to a Committee of Eleven, consisting of one member from each state which had then ratified the Constitution.¹¹³ Madison represented Virginia on the Committee and apparently continued to serve as a driving force behind the amendments. On August 13, 1789, the House began discussion of the report of the Committee¹¹⁴ and, by August 17, 1789, had reached the provisions which later became the fifth and sixth amendments. The fifth amendment debate centered exclusively on the double jeopardy provisions and thus is of no relevance here.¹¹⁵ The debate on the sixth amendment provisions is interesting because of its brevity. The only known recorded House debate over what is now the sixth amendment was as follows:

The committee then proceeded to consider the seventh proposition, in the words following:

Article 3, section 2. Strike out the whole of the third paragraph, and insert, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation,

¹¹²*Id.* at 434-35.

¹¹³*Id.* at 660-65.

¹¹⁴*Id.* at 703. Madison's draft of the criminal protections was patterned after the Virginia Declaration of Rights and Virginia Recommendation No. 8 from its ratifying convention. The only change made by Madison was to substitute the language "to have compulsory process for obtaining witnesses in his favour" for the language "to call for evidence in his favour." See generally Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 97-98 (1974) [hereinafter cited as WESTEN].

¹¹⁵See 1 ANNALS OF CONG. 753-54 (1789).

to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

MR. BURKE moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence.

MR. HARTLEY said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court.

MR. SMITH, of South Carolina, thought the regulation would come properly in, as part of the judicial system.

The question on MR. BURKE's motion was taken and lost; ayes 9, noes 41.

MR. LIVERMORE moved to alter the clause, so as to secure to the criminal the right of being tried in the State where the offence was committed.

MR. STONE observed that full provision was made on the subject in the subsequent clause.

On the question, MR. LIVERMORE's motion was adopted.

MR. BURKE said he was not so much discouraged by the fate of his former motions, but that he would venture upon another. He therefore proposed to add to the clause, "that no criminal prosecution should be had by way of information."

MR. HARTLEY only requested the gentleman to look to the clause, and he would see the impropriety of inserting it in this place.

A desultory conversation arose, respecting the foregoing motion, and after some time, MR. BURKE withdrew it for the present.

The committee then rose and reported progress, after which the House adjourned.¹¹⁶

Obviously, the sixth amendment guarantees were neither controversial nor the subject of laborious drafting or technical amendments. In view of the variation in state constitutional formulations in this area,¹¹⁷ it is remarkable that there was so little debate. Madison, a Virginian, had drafted the sixth amendment guarantees following the pattern set in the Virginia Declaration of Rights. His only major departure was the substitution of the

¹¹⁶1 ANNALS OF CONG. 755-56 (1789).

¹¹⁷See notes 98-103 *supra* and accompanying text.

right "to have compulsory process for obtaining witnesses in his favour" for Virginia's language guaranteeing the right "to call for evidence in his favour." No one suggested that the Massachusetts protection of the "right to produce all proofs, that may be favorable to [the accused]" ought to be added. No one urged either the New Jersey language, which guaranteed equality between prosecution and defense in regards to witnesses and counsel, or the Virginia formulation. This lack of debate might reflect either of two possible legislative intentions. It might indicate that Congress deliberately sought to exclude both the Massachusetts guarantee of the right to present a defense and the New Jersey equality principle. Alternatively, it might indicate that the Framers considered fifth and sixth amendments to be comparable to the Virginia, Massachusetts, and New Jersey formulations of criminal trial guarantees and to provide fundamentally the same protections.¹¹⁸

While the record is not free from ambiguity, the view that the House believed that the language of the fifth and sixth amendments provided the same protections as the Massachusetts and New Jersey provisions seems to be most in keeping with the historical circumstances in which those amendments were adopted. Madison, the drafter of the amendments, had naturally turned to his own state's Declaration of Rights as a form for the bulk of his handiwork. Since five other states had followed Virginia's formulation, it numerically represented the most widely used formulation among the constitutions of the new states. Yet, Massachusetts, New Hampshire, and New Jersey all had varying guarantees, and all were presented in the First Congress which considered the Bill of Rights.¹¹⁹ Given the economic and state rivalries that had developed between the northeastern states, especially Massachusetts, and the southern states, especially Virginia,¹²⁰ it seems remarkable that none of the representatives from these three northeastern states objected to incorporating into the Federal Constitution a formulation of rights based substantially on the Virginia Declaration of Rights unless it was assumed that the Virginia formulation and the language adopted in the fifth and sixth amendments had a meaning substantially similar to that of the Massachusetts, New Hampshire, and New Jersey provisions.

¹¹⁸This explanation would also serve to explain Madison's drafting changes. See note 114 *supra*.

¹¹⁹2 SCHWARTZ, *supra* note 53, at 1050.

¹²⁰1 G. CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* 504-14 (1st ed. 1897); 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 194, 315-16 (1953); C. WARREN, *THE MAKING OF THE CONSTITUTION* 570-75 (2d ed. 1937).

The House of Representatives finally voted on and approved the proposed amendments on August 24, 1789. At that point in time, the sixth amendment guarantees read as set forth above.¹²¹ The fifth amendment guarantees then read:

The trial of all crimes [except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger] shall be by an impartial jury of the vicinage, with the requisites of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment by a grand jury; but if a crime be committed in a place in possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state.¹²²

The Senate's review of the amendments commenced on August 25, 1789.¹²³ Like the House, the Senate seemed relatively unconcerned about the amendments, and there is a disappointing lack of information about its debates. The sixth amendment guarantees were adopted without change by the Senate on September 7, 1789, apparently with little or no debate.¹²⁴ However, the Senate rejected at that time the House formulation of the fifth amendment protections.¹²⁵ The fifth amendment guarantees were redrafted by the Senate in response to its September 7th debates. The Senate finally drafted and agreed to the formulation now found in that amendment.¹²⁶ However, by an evenly divided vote, on the same day, the Senate refused to concur in the House guarantee of a

¹²¹ See text accompanying note 120 *supra*.

¹²² 1 ANNALS OF CONG. (1789).

¹²³ 2 SCHWARTZ, *supra* note 53, at 1145.

¹²⁴ *Id.* at 1150-57; 1 ANNALS OF CONG. 75-76 (1789).

¹²⁵ 2 SCHWARTZ, *supra* note 53, at 1150-57. Interestingly, twenty other unsuccessful amendment proposals were also considered at this juncture in the amendment process, and none dealt with the trial rights of criminal defendants. *Id.* at 1151-53; 1 ANNALS OF CONG. 76 (1789).

¹²⁶

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject to be put in jeopardy of life or limb, for the same offence; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2 SCHWARTZ, *supra* note 53, at 1154.

right to trial by jury and its ancillary protections. The Senate took its final vote on September 9, 1789,¹²⁷ and continued to adhere to its original position, approving the sixth amendment guarantees as drafted in the House, and redrafted the fifth amendment guarantees by deleting the right to jury trial. The lack of debate preceding the Senate's acceptance of the sixth amendment might further support the thesis that the First Congress assumed that the House formulation of the sixth amendment included all rights protected in the Virginia, Massachusetts, New Hampshire and New Jersey bill of rights provisions.¹²⁸

After the Senate changes were reviewed by the House, the entire matter of the amendments to the Constitution was submitted to conference committee.¹²⁹ Once again Madison played a key role, serving as one of the House conferees and reporting the Conference Report to the House. The only important aspect of the Conference Report for the purposes of this Article is the fact that the report reincorporated the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed," appending this right to the sixth amendment formulation rather than the fifth amendment as originally adopted in the House.¹³⁰ The Conference Report was passed by both Houses and twelve initial amendments to the Constitution, including the fifth and sixth amendments, were submitted to the states for ratification.¹³¹ Unfortunately, the available information on the ratification debates in the state legislatures sheds no light whatsoever on the issue of whether ratifying states intended the fifth and sixth amendments to incorporate a general right to present a defense.

Thus, the historical background of the Bill of Rights leaves unclear the intent of the Framers of the fifth and sixth amendments. However, one possible inference from the history of the Bill of Rights suggests that Madison and the other members of the First Congress who framed and submitted the fifth and sixth amendments intended thereby to remove all obstacles then extant to the ability of the accused to fully and fairly defend himself against criminal accusations. Thus, the history of the Bill of Rights lends some support to the view that the spirit or

¹²⁷*Id.* at 1157; 1 ANNALS OF CONG. 77 (1789).

¹²⁸Interestingly, Caleb Strong, one of the chief drafters of the Massachusetts Declaration of Rights, was a member of the Senate, but he was inexplicably absent from the vote on the sixth amendment. His absence may show his lack of concern over the change in language. 1 ANNALS OF CONG. 15 (1789); cf. 2 SCHWARTZ, *supra* note 53, at 1154.

¹²⁹2 SCHWARTZ, *supra* note 53, at 1159.

¹³⁰*Id.* at 1162.

¹³¹*Id.* at 1162-66.

penumbras¹³² of the fifth and sixth amendment rights and the due process clause of the fifth amendment generally protect the criminal defendant's ability to present his defense, above and beyond the express guarantees.

III. DEVELOPMENTS AFTER THE BILL OF RIGHTS: THE CREATION OF NEW OBSTACLES IN THE DEFENDANT'S PATH

During the nearly two centuries of legal development following the adoption of the Bill of Rights, there were many major departures from the criminal trial process known to the Framers of the Bill of Rights. Many of these departures had the impact of creating new obstacles to the presentation of the defense case which were never envisioned by the drafters of the fifth and sixth amendments. Obviously, any comprehensive survey of these developments is beyond the scope of the present enterprise. However, the major trend of the nineteenth and twentieth centuries can be summarized as having the effect of codifying and solidifying concepts of evidence and criminal procedure. This trend appears to reflect the growth of the codification process which took root and flourished in all areas of American law during the nineteenth century and resulted in such renowned products as the Field Code.¹³³ Many of the newly developed criminal procedures and evidentiary rules operated to exclude evidence deemed central to the defense; however, only recently has the Supreme Court begun to address some of the ramifications of these developments.¹³⁴

A comparison of the late eighteenth century criminal trial with its modern counterpart shows the marked evolution of criminal procedures during the last one hundred and eighty years. As noted above,¹³⁵ the criminal trial of the late eighteenth century had few formalized rules of evidence, other than general notions of relevancy and testimonial competence, and even fewer formalized rules of procedure. Compared to the highly structured modern criminal trials, these early trials were rather formless, loose affairs.¹³⁶

¹³²Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹³³See generally Morris, *Some Historical Origins of Statutory Law and Judicial Decisions in North Dakota*, in ESSAYS IN HISTORY IN HONOR OF FELIX FRANKFURTER 101 (Forkosch ed. 1966).

¹³⁴See cases cited note 4 *supra*.

¹³⁵See notes 68-83 *supra* and accompanying text.

¹³⁶Although most state constitutions guaranteed the right to counsel, many defendants appeared *pro se*. Even when rules of evidence were applicable, they did not in fact significantly hamper the defendant's presentation of his defense since he was permitted to address the jury personally in an unsworn capacity and thereby present whatever material he desired in his own behalf unhampered by formal rules of evidence. LEVY, *supra* note 44, at 322-23.

During the nineteenth century, several major changes occurred. Counsel began to appear more frequently on behalf of criminal defendants,¹³⁷ and the defendant's disqualification from giving sworn testimony gradually disappeared. The latter development began by statutory change in Maine in 1864¹³⁸ and slowly crept throughout the nation so that by the mid-twentieth century, all states except Georgia permitted the accused to testify in his own behalf.¹³⁹ The Georgia testimonial disqualification rule was not remedied until the Supreme Court's decision in *Ferguson v. Georgia*¹⁴⁰ in 1961. The reluctance to change the rule disqualifying the defendant seems to have been based both on fears of possible self-incrimination and on an assumed lack of weight of the accused's testimony resulting from his obvious interest.¹⁴¹ The removal of the testimonial disqualification of the accused was accompanied by new procedural rules, including the requirement that the accused testify first if at all,¹⁴² and the disqualification of accomplices from testifying on behalf of the defendant,¹⁴³ which proved to be detrimental to the defense.¹⁴⁴

¹³⁷SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 41 (1959).

¹³⁸Me. Pub. L. of 1864, ch. 280 (codified at ME. REV. STAT. ANN. tit. 15, § 1315 (1965)). This development was, according to Wigmore, followed by Massachusetts in 1866, by Connecticut in 1867, by New York and New Hampshire in 1869, and by New Jersey in 1871. 2 WIGMORE, *supra* note 23, § 579, at 701 n.2. Michigan may have attempted an even earlier modification of the disqualification rule in 1861 only to see it interpreted in a fashion which rendered it inapplicable in a criminal case. See *People v. Thomas*, 9 Mich. 314 (1861). In England the change of the rule disqualifying the defendant from giving sworn testimony took even more time. Although Bentham criticized the rule as early as 1827, the legislative attack on the rule did not begin in England until 1872 and did not come to full fruition until 1898. 2 WIGMORE, *supra* note 23, § 579, at 701 n.3. As late as 1930 in the British Indian trials, the accused was still deemed disqualified from testifying. C. WALSH, CRIME IN INDIA 51 (1930), *relied upon* in 2 WIGMORE, *supra* note 23, § 579, at 701 n.3.

¹³⁹2 WIGMORE, *supra* note 23, § 579.

¹⁴⁰365 U.S. 570 (1961).

¹⁴¹See, e.g., *People v. Tyler*, 36 Cal. 522, 528 (1869); *State v. Cameron*, 40 Vt. 555, 565 (1868). See generally H. STEPHEN, PRISONERS ON OATH, PRESENT AND FUTURE (1898); *Testimony of Persons Accused of Crime*, 1 AM. L. REV. 443, 446 (1867).

¹⁴²See, e.g., TENN. CODE ANN. § 40-2403 (1975) (declared unconstitutional in *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972)).

¹⁴³See, e.g., Tex. Penal Code of 1925, art. 82 (repealed 1973); Tex. Code Crim. Pro., art. 711 (1925) (repealed 1965). But see *Washington v. Texas*, 388 U.S. 14, 19-21 (1967).

¹⁴⁴The United States Supreme Court has also been forced to confront the ramifications of these limitations on the accused's ability to defend himself. See *Brooks v. Tennessee*, 406 U.S. 605 (1972), and *Washington v. Texas*, 388 U.S. 14 (1967), discussed *infra* at text accompanying notes 268-97 & 315-38.

Simultaneously with the growth of the defendant's right to testify, his right to freely address the jury unfettered by rules of evidence atrophied. The courts commonly held that the statutes allowing the defendant to testify under oath implicitly abolished the common law right of the defendant to make an unsworn statement free from cross-examination.¹⁴⁵ As the Louisiana Supreme Court stated, "[T]he rule ceases when the reason on which it is founded ceases"¹⁴⁶ While one might question the Louisiana court's conclusion that the reason for the rule ceased with the change in practice allowing the accused to give sworn testimony,¹⁴⁷ most states rapidly followed this line of analysis.¹⁴⁸

Thus, the nineteenth and twentieth century trends toward increasing jurisprudential rigidity and formalization of rules of evidence and procedure created new problems for the accused. Whereas criminal defendants might previously have had the opportunity to make complete and unfettered statements, they now found themselves thrust onto the witness stand and portions of their testimony occasionally excluded by evidentiary rulings.¹⁴⁹ State courts¹⁵⁰ and federal courts¹⁵¹ adopted various procedural rules which sanction noncompliance by excluding evidence offered on behalf of the accused. These evidentiary and procedural rules and other outgrowths of the legal formalization since 1789 now stand as the primary hurdles to the accused in presenting a defense. The

¹⁴⁵See, e.g., O'Loughlin v. People, 90 Colo. 368, 10 P.2d 543 (1932); State v. Louviere, 169 La. 109, 124 So. 188 (1929). Indeed, some common law jurisdictions appear to continue to allow the accused to elect whether to take the stand and give sworn testimony subject to cross-examination or to give an unsworn statement to the jury. While it is generally assumed that the latter "testimony" is given a lesser weight, the election remains.

¹⁴⁶State v. Louviere, 169 La. 109, 124 So. 188, 192 (1929). Cf. People v. Thomas, 9 Mich. 314 (1861).

¹⁴⁷The accused's right to make an unsworn statement may have also served the purpose of permitting the accused to fully present his defense, explanation, or mitigating factors without being ensnared by technical rules of evidence. Furthermore, precluding cross-examination of the accused who made a statement protected his privilege against self-incrimination while allowing him to participate in his own defense. Obviously, the simple grant of testimonial competency to the accused performs neither of these functions.

¹⁴⁸When Angela Davis secured permission in her recent and highly publicized trial to serve as her own counsel and was thereby permitted to make opening and closing statements without taking the stand as a witness subject to cross-examination, this practice was regarded by many as a radical new departure in criminal procedure. In fact, the practice had strong roots in the now little-known common law right of the accused to represent himself and make an unsworn statement to the jury.

¹⁴⁹See, e.g., United States v. Borkenhagen, 468 F.2d 43, 50 (7th Cir. 1972).

¹⁵⁰FLA. R. CRIM. P. 3.200 (1975); ORE. REV. STAT. § 135.865 (1975).

¹⁵¹See FED. R. CRIM. P. 12.1.

reaction of the United States Supreme Court to these developments has not been wholly consistent. It is only recently that the Court has directly confronted the constitutional ramifications of some of these post-Bill of Rights developments.

IV. THE SUPREME COURT AND THE EMERGENT RIGHT TO PRESENT A DEFENSE

Cases involving exclusion of portions of the defense case in criminal matters were slow to reach the United States Supreme Court. Indeed, it was not until 1851¹⁵² that the Court even ruled comprehensively on the rules of evidence to be used in federal criminal cases. Thus, it is not surprising that most of the early cases challenging exclusion of defense evidence did not raise constitutional challenges but were argued and resolved pursuant to nonconstitutional rules of procedural or evidentiary law and were predicated on the Supreme Court's supervisory power over the inferior federal courts.¹⁵³ This trend seemingly reflected the emphasis placed on evidentiary and procedural formalization, noted previously in this Article.¹⁵⁴ It was not until the 1960's, when federal constitutional protections were rapidly extended to state criminal procedural matters, that the constitutional implications of hindering the presentation of the accused's defense surfaced in Supreme Court decisions. However, certain constitutional developments even before the 1960's provided the groundwork for these later cases. This section will discuss the pre-1960 developments and scrutinize the Supreme Court's historic attitudes toward cases challenging the exclusion of portions of the defense case.

A. Early Decisions: The Evidentiary Focus

Apparently the first case to reach the Supreme Court challenging exclusion of portions of the accused's case¹⁵⁵ was *United States v. Reid*,¹⁵⁶ decided in 1851. The issue posed in that murder appeal, tried in the Virginia federal court pursuant to admiralty jurisdiction, was the propriety of the exclusion of the testimony of an accomplice offered on behalf of the accused. The Virginia legislature had adopted a statute which rendered the testimony of an accomplice competent evidence if the accomplice was tried separately. The defendant, relying on this statute, argued that Sec-

¹⁵²United States v. Reid, 53 U.S. (12 How.) 361 (1851).

¹⁵³See, e.g., *Rosen v. United States*, 245 U.S. 467 (1918).

¹⁵⁴See notes 133-43 *supra* and accompanying text.

¹⁵⁵Cf. *Windsor v. McVeigh*, 93 U.S. 274 (1876); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870) (denials of opportunity to defend found to be error).

¹⁵⁶53 U.S. (12 How.) 361 (1851).

tion 38 of the Judiciary Act of 1789,¹⁵⁷ which had adopted the laws of the state as the rules for decision in the federal court, rendered the exclusion of the testimony erroneous. Chief Justice Taney's opinion for the Court in *Reid* rejected the defendant's argument and construed the 1789 Act to refer only to civil trials "at common law." Thus, the Court held that "the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed."¹⁵⁸ Chief Justice Taney briefly outlined the history of criminal trial procedure, including the denials of compulsory process, confrontation, and the right to counsel on all but legal matters. He concluded that the state and federal governments had sought to eliminate this "oppressive mode of proceeding"¹⁵⁹ by various statutes and ultimately by their bill of rights guarantees. He further stated that the fifth and sixth amendment guarantees were designed to provide "the same mode of trial, and the same mode of proceeding, that had been previously established and practised in the courts of the several states."¹⁶⁰ Since the right to call an accomplice to testify had not been provided in the state courts and was not enumerated in the Bills of Rights, Taney held it was not available in federal criminal trials.

Reid did not, however, survive very long into the twentieth century. As the Court noted in *Washington v. Texas*,¹⁶¹ when it returned to the same issue in a sixth amendment challenge, *Reid* was expressly overruled in 1918 by *Rosen v. United States*.¹⁶² Although *Rosen* dealt with the testimony of an accomplice which was offered by the government, the rationale of the Court's opinion appears to be as important to the defendant as the prosecution:

[T]ruth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent¹⁶³

Thus when *Rosen* was decided in 1918, the Court had seemingly adopted a preference for admissibility of evidence, leaving the trier of fact to determine its weight.

¹⁵⁷ 28 U.S.C. § 1652 (1970).

¹⁵⁸ 53 U.S. at 361.

¹⁵⁹ *Id.* at 364.

¹⁶⁰ *Id.*

¹⁶¹ 388 U.S. 14, 21-22 (1967). See notes 266-91 *infra* and accompanying text.

¹⁶² 245 U.S. 467 (1918).

¹⁶³ *Id.* at 471.

Even though it has been overruled by *Rosen*, the *Reid* case is important because of the theoretical framework in which the Court discussed the exclusion of evidence offered on behalf of the defendant. While touching on the fifth and sixth amendments in dicta, Chief Justice Taney's opinion in *Reid* did not treat the problem of exclusion of defense evidence as an issue of constitutional magnitude. Instead, his analysis rested simply on issues of statutory interpretation and the Supreme Court's authority to supervise the mode of trial in the inferior federal courts. This approach to cases involving exclusion of defense evidence continued until the 1960's, when cases arising from the state courts began to raise similar problems in a constitutional context. So long as the criminal cases with which the Court dealt arose from the federal courts, it was a relatively simple matter to avoid the constitutional implications of the exclusion of portions of the accused's defense.

During the period between 1895 and 1920, the Supreme Court decided a number of cases in which one of the assigned errors was the exclusion of a portion of the defendant's case. While precedent existed for deciding these cases on constitutional grounds,¹⁶⁴ the Court relied almost exclusively on evidentiary rules and gave little attention to the fairness of the application of such rules in the particular context of the case or to the effect that such rules had on the defendant's ability to offer a defense. In *Mattox v. United States*,¹⁶⁵ the Supreme Court upheld the exclusion of the testimony of two defense witnesses in a murder trial. The proffered testimony involved certain prior inconsistent statements of a prosecution witness and certain other statements which tended to exonerate the accused. The prosecution witness had since died and his prior recorded testimony had been introduced against the accused. Deciding the case on strictly evidentiary grounds, with little reference to the criminal nature of the proceedings, the Court reasoned that since the proper foundation for the prior inconsistent statement could not be laid because of the death of the witness, the evidence was inadmissible. Three Justices dissented, protesting that the result of the decision was "to sacrifice substance of proof to orderliness of procedure, and the rights of the living party to consideration for the deceased witness."¹⁶⁶ Similarly, in *Andersen v. United States*,¹⁶⁷ the Court in an admiralty murder case upheld on relevancy grounds the exclusion

¹⁶⁴See, e.g., *Hovey v. Elliott*, 167 U.S. 409 (1897); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870). See notes 178-84 *infra* and accompanying text.

¹⁶⁵156 U.S. 237 (1895).

¹⁶⁶*Id.* at 260 (Shiras, J., dissenting).

¹⁶⁷170 U.S. 481 (1898).

of the defendant's proffered testimony regarding a prior altercation with the murder victim. Again the case was decided on strictly evidentiary grounds, with little attention to its impact on the ability of the defendant to present his theory of defense.

*Donnelly v. United States*¹⁶⁸ also presented similar issues. Donnelly was charged with the murder of an Indian in Indian country and sought to introduce in his own behalf a confession to the crime by a person since deceased. The confession was partially corroborated by extrinsic circumstantial evidence indicating the likelihood of the deceased confessor's presence at the scene of the crime. Despite these indicia of reliability and the centrality of the confession to the accused's defense, the Court rejected the claim. The opinion for the majority in *Donnelly* treated the issue merely as a classic hearsay problem, finding declarations against penal interest to be outside any traditional hearsay rule exception. The majority opinion contained no reference to any constitutional problem¹⁶⁹ nor any discussion of the fairness of excluding this portion of the accused's defense. Three Justices dissented. Led by Justice Holmes, they protested not only the evidentiary rule involved but also the fairness of its application in the context of that criminal case:

[N]o other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . and when we surround the accused with so many safeguards . . . I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.¹⁷⁰

After the turn of the century, the Court also decided several cases upholding the traditional competency rule excluding the testimony of the accused's spouse when offered on his behalf.¹⁷¹ As in the foregoing cases, the Court considered and decided the issue strictly by application of evidentiary law, with no consideration of either constitutional concerns or issues of fairness to the defendant.

Even when the Court reversed convictions on the basis of improper exclusion of portions of the accused's evidence, fundamental fairness questions were rarely considered. Procedural and evidentiary rules were the gravamen of the decisions. Thus, in

¹⁶⁸228 U.S. 243 (1913).

¹⁶⁹Cf. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

¹⁷⁰228 U.S. at 278 (Holmes, J., dissenting, joined by Hughes & Lurton, JJ.).

¹⁷¹*Jin Fuey Moy v. United States*, 254 U.S. 189, 195 (1920); *Hendrix v. United States*, 219 U.S. 79, 91 (1911).

Carver v. United States,¹⁷² the Court reversed a murder conviction because two important portions of the defense case had been excluded at trial. The Court held it improper to exclude the testimony of witnesses offered by the defendant to prove the contents of conversations occurring between the decedent and the accused immediately after the accused had shot the decedent. Finding that these conversations were part of the *res gestae*, the Court could find no evidentiary basis for their exclusion, particularly since the prosecution had been allowed to present portions of these conversations under a dying declaration theory. The Court therefore held that it was equally competent for the accused to present his witnesses' versions of the conversations. The issue was resolved strictly as a matter of evidentiary law. The closest the Court came to discussing any notion of fairness was the statement that, "If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their [sic] version of it."¹⁷³ The Court in *Carver* also held that the defendant had been improperly prevented from introducing evidence that the decedent had made statements inconsistent with her dying declarations which were introduced by the prosecution. These statements tended to show that the defendant had not shot the decedent intentionally. Again the decision was predicated almost exclusively on evidentiary considerations, with no constitutional analysis undertaken.

Probably the strongest early statement by the Court regarding the exclusion of portions of the defense's evidence came in *Crawford v. United States*.¹⁷⁴ *Crawford* was charged with a conspiracy to defraud the federal government. At trial the prosecution was permitted to introduce a letter written by one of the prosecution witnesses charging the accused with removing and erasing potential evidence. To counter this evidence, the defendant sought to introduce his attorney's reply to the letter and to provide his own explanation in his own testimony. This evidence was excluded by the trial court. The defendant also sought to introduce a ledger in which he kept relevant accounts in order to prove the legitimacy of his business transactions. The Supreme Court reversed *Crawford*'s conviction, holding that the exclusion of such items of evidence was erroneous.¹⁷⁵ The most important state-

¹⁷²164 U.S. 694 (1897).

¹⁷³*Id.* at 696-97.

¹⁷⁴212 U.S. 183 (1909).

¹⁷⁵The Court reasoned that *Crawford*'s attorney's letter should have been admitted as an explanation of the facts surrounding the accusation contained in the letter which was admitted into evidence. The letter offered by the prosecution was of doubtful admissibility in any event, unless accompanied by the explanation. *Id.* at 199. The Court viewed similarly *Crawford*'s efforts to explain his intention in drafting the letters. *Id.* at 202. However,

ment in the opinion was that a presumption of error would arise from the exclusion of material defense evidence.¹⁷⁶ Additionally, the entire tone of the Court's opinion reflected a concern with assuring a fair trial for the accused.¹⁷⁷ However, this case also was ultimately decided on matters of evidentiary law without reference to the Constitution.

Thus, the earliest criminal cases in the United States Supreme Court which challenged the exclusion of portions of the defense case were decided on strictly evidentiary grounds. Considerations of constitutional law or fairness appear to have been generally ignored in the opinions. The reasons for this phenomenon, while not evident in the cases, are not difficult to imagine. Most of these early cases occurred in the late nineteenth and early twentieth centuries, with the vast majority decided between 1895 and 1920. During most of this period, almost all of the criminal cases reaching the Supreme Court arrived there by way of appeal on writ of error from lower federal courts. Since the Court has appellate and supervisory power over the law and procedures of the inferior federal courts, there was seldom any need to reach questions of constitutional magnitude. Indeed, it was only after the fourteenth amendment revolution of the 1960's that any extensive process of applying federal constitutional law to state criminal trials began. Accordingly, the Court was seldom faced with constitutional challenges to state criminal decisions. Even more important is the fact that the jurisprudence of this era was focused on a great formalization of evidentiary and procedural rules. Thus, it is not surprising that cases were argued and decided solely on the basis of evidentiary and procedural law, without any reference to constitutional problems.

B. *The Court's Early Constitutional Framework: Due Process and the Right To Be Heard*

The Supreme Court decisions before 1960 are not wholly without importance for the post-1960 cases which began to build the Court did not find exclusion of the explanation prejudicial. *Id.* at 205. In addition to the discussion of the exclusion of evidence surrounding Crawford's letters, the Court also held that the trial judge could not presume the irregularity of Crawford's ledgers and thereby exclude them. The ledger was offered as an ordinary account, or business record, and the defendant testified that it had not been altered or forged. The Court thus concluded that the ledger was admissible and its value was for the jury. *Id.* at 207-08.

¹⁷⁶*Id.* at 203. However, the Court admitted that the presumption could be rebutted by showing clearly from the record an absence of harm to the defendant. *Id.* Thus, *Crawford* arguably represents one of the foundations of the harmless error rule now incorporated in rule 52(a) of the Federal Rules of Criminal Procedure.

¹⁷⁷See, e.g., 212 U.S. at 203: "The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him."

the right to present a defense. During this earlier period, the Court began to construct the constitutional framework of the due process right to be heard relied upon by some of the post-1960 cases.

The due process right to be heard cases began with *McVeigh v. United States*,¹⁷⁸ a civil case which arose from an effort made during the Civil War to forfeit part of McVeigh's real and personal property and a resulting libel proceeding. When McVeigh appeared by counsel, the attorney for the United States moved successfully to strike McVeigh's appearance, answer and claim on the ground that McVeigh was an enemy alien then living within the Confederacy. An order of forfeiture was entered which the Supreme Court reversed, finding that the refusal to permit McVeigh to defend his property was a gross error, apparently of constitutional magnitude.

The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice.¹⁷⁹

Thus, the Supreme Court was rather forceful in its early assertion that the right to be heard in defense of one's rights is fundamental. The principle that the defendant must be given his day in court was rapidly reaffirmed in *Windsor v. McVeigh*¹⁸⁰ which involved an identical factual pattern. In that case the Court reaffirmed its earlier decision and said:

Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.¹⁸¹

¹⁷⁸78 U.S. (11 Wall.) 259 (1870).

¹⁷⁹*Id.* at 267.

¹⁸⁰93 U.S. 274 (1876).

¹⁸¹*Id.* at 277. See also *Galpin v. Page*, 85 U.S. (18 Wall.) 350 (1873), in which the Court stated: "It is a rule as old as the law . . . that no one shall be personally bound until he has had his day in court, by which is meant,

The Supreme Court relied on the two *McVeigh* cases in *Hovey v. Elliott*,¹⁸² where the Court clearly held that "due process of law signifies a right to be heard in one's defence."¹⁸³ *Hovey* involved the issue of whether a District of Columbia court could strike a party's answer and confess judgment against him for his alleged contempt in failing to pay into court sums of money held by him and for refusing to appear when summoned to do so. The Court held that such a procedure denied the litigant due process of law. The Court conducted an extensive review of common law principles and English precedents¹⁸⁴ in reaching its conclusion that the opportunity to be heard was a fundamental constitutional right of all citizens. The due process right to be heard thereafter developed rapidly in civil cases and was readily accepted.¹⁸⁵

However, before the 1960's few applications of due process principles can be found in criminal cases. Certainly before the 1960's the concept of the right to be heard rarely was connected with a right to present particular items of evidence or to present them in a particular fashion. Although the Court had the opportunity to merge these concepts in two appeals entitled *McGinis v. California*,¹⁸⁶ the Court's opinions in those cases are wholly unenlightening. The cases involved the efforts of an accused to defend himself against state charges of possession of cocaine and heroin by proving that the drugs were part of a shipment destined for Mexico pursuant to United States Treasury Department regulations. The trial judge, apparently convinced that the crime of possession was proven when possession was shown, regardless of the intent or purpose of the possessor, excluded the proffered evidence as immaterial. After the California appellate courts affirmed, the United States Supreme Court heard the case and held that "the rulings were error."¹⁸⁷ Unfortunately, the Court failed to discuss the constitutional issues involved. While noting that the defendant asserted rights under the commerce clause of the Constitution and that a supremacy issue might be involved,¹⁸⁸ the Court simply found the excluded evidence to be relevant and competent and therefore held that it should have been considered. No cases or constitutional authority were cited.

until he has been duly cited to appear, and has been afforded an opportunity to be heard." *Id.* at 368-69 (emphasis added).

¹⁸²167 U.S. 409 (1897).

¹⁸³*Id.* at 417.

¹⁸⁴*Id.* at 415-17.

¹⁸⁵See, e.g., *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 356 (1937); *White v. Johnson*, 282 U.S. 367, 374 (1931); *Chicago Junction Case*, 264 U.S. 258, 265 (1924); *Bradley v. City of Richmond*, 227 U.S. 477, 483 (1913).

¹⁸⁶247 U.S. 91, 95 (1918).

¹⁸⁷*Id.* at 96.

¹⁸⁸*Id.* at 94.

Thus, it is unclear whether the *McGinis* decision rested essentially on substantive grounds of federal supremacy and the commerce clause rights or on a procedural due process rationale. Obviously, since the Supreme Court was reviewing a state conviction, the Court must have assumed that some type of federal constitutional issue was involved. Unfortunately, the precise nature of the error the Court found remains an unresolved enigma.

The constitutional momentum behind the right to present a defense accelerated in a line of criminal contempt cases decided by the Court during the first half of the twentieth century. In *Cooke v. United States*,¹⁸⁹ the Court addressed the problem of summary contempt procedures invoked for conduct occurring outside the presence of the court.¹⁹⁰ In *Cooke*, the accused, an attorney, had written a letter to a federal judge who had just rendered a substantial judgment against the accused's client. The letter indicated the accused's desire to see the judge recuse himself in several related cases which were yet to be heard. The judge found the letter contemptuous and ordered Cooke arrested. Cooke was brought before the court and, after admitting that he had prepared and sent the letter, was prevented from making any statements concerning his justification or excuse. He was also specifically prevented from proving that the statements contained in his letter were true. In short, Cooke was summarily tried and convicted of contempt without the opportunity to present any defense. Although the Supreme Court found Cooke's letter contemptuous, the Court unanimously reversed Cooke's contempt citation on the ground that he was prevented from presenting his defense. While recognizing that federal courts have the power to summarily punish contempts occurring in their presence, Chief Justice Taft's opinion stressed that fifth amendment imperatives generally require the opportunity to defend in federal courts.

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation in extenuation of the offense and in mitigation of the penalty to be imposed.¹⁹¹

Thus, the Court imported into criminal contempt cases the concepts previously developed in private civil law cases¹⁹² and recog-

¹⁸⁹267 U.S. 517 (1925).

¹⁹⁰See also *Savin, Petitioner*, 131 U.S. 267 (1889).

¹⁹¹267 U.S. at 537.

¹⁹²See notes 178-81 *supra* and accompanying text.

nized that criminal defendants have a constitutionally protected due process right to be heard in reply to the criminal charges lodged against them. While this proposition is by no mean startling, it is remarkable that it was not until 1925 that it even received partial recognition.

The rationale of *Cooke* was continued in *In re Oliver*¹⁹³ in which the Supreme Court, utilizing the fourteenth amendment, extended the *Cooke* analysis to state criminal contempt proceedings. In *Oliver*, the summary contempt citation had been issued against a witness whom the judge claimed had falsely testified before a Michigan circuit judge acting as a special investigatory body. After the witness had apparently answered all questions posed by the judge who was serving as the "one man grand jury," the judge summarily charged, convicted and sentenced him for contempt, stating that his testimony did not "jell."¹⁹⁴ In striking down the application of this summary procedure, the Court concluded that it violated due process of law since, according to *Cooke*, a reasonable opportunity to defend was a central element of due process of law.¹⁹⁵

Thus, *Cooke* and *Oliver* clearly established the principle that the criminally accused have a right to present a defense protected by the due process clauses of the fifth and fourteenth amendments. Yet, until the flood of state criminal cases reached the Court in the 1960's, little development or elaboration of the right to present a defense occurred. The reason for the lack of development before 1960 is somewhat understandable. Cases such as *Cooke* and *Oliver*, in which no defense whatsoever is permitted, depict most graphically the spectre of a powerless defendant pitted against the all-powerful mechanisms of the state; and that spectre naturally evoked the judicial reactions the Framers of the Constitution probably would have expected. Except in contempt cases and possibly traffic cases or court martials, summary convictions are almost unknown in twentieth century American criminal jurisprudence. Thus, very few cases will raise the issue of the right to present a defense in the clear context presented in *Cooke* or *Oliver*.¹⁹⁶ However, a more common problem in the American system of criminal justice is the determination of the right to present a defense in situations in which the defense case is only

¹⁹³333 U.S. 257 (1948).

¹⁹⁴*Id.* at 259.

¹⁹⁵*Id.* at 274-76.

¹⁹⁶The Court did, however, apply the rationale of *In re Oliver* to hold in *Cole v. Arkansas*, 333 U.S. 196 (1948), that a criminal defendant could not, consistently with the fourteenth amendment, be convicted of a crime for which he was not charged in the indictment, because such a conviction partially denied him a "chance to be heard." *Id.* at 201.

partially excluded by procedural or evidentiary rules, and the United States Supreme Court only once significantly addressed constitutional challenges to that problem prior to 1960.

Unfortunately, the Supreme Court's first opportunity after *Cooke* to discuss the constitutional ramifications of the right to present a defense in the context of partial exclusion of the defense case came in *Yakus v. United States*.¹⁹⁷ *Yakus* involved a criminal prosecution arising out of price regulations imposed during World War II and was one of the Court's decisions upholding the Emergency Price Control Act of 1942 as a permissible wartime measure to prevent inflation and marshal national resources.¹⁹⁸ One of the issues raised in *Yakus*, however, had direct relevancy to the right to present a defense. The issue arose from the fact that the Emergency Price Control Act provided an exclusive administrative and judicial procedure for determining the validity of the price regulations. The procedure required that challenges to regulations be heard only on protests filed within two months from the date the regulation was promulgated and that the challenges were to be heard solely by the Administrator of the Act and reviewed only by injunctive or declaratory action in a special Emergency Court of Appeals.¹⁹⁹ Both the Administrator and the court sat in Washington, D.C. The defendants in *Yakus* were indicted for violation of a regulation establishing maximum wholesale prices of beef. Although the defendants had not sought to challenge the prices through the administrative process and the time for filing protests to the validity of the regulations had expired by the time of the trial, the defendants sought, as part of their defense, to challenge the validity of the price regulations on both due process grounds and on the basis that they did not conform to the requirements of the Act. Because of the exclusive statutory commitment of these issues to the Administrator and the Emergency Court of Appeals, the district court excluded the proffered defense evidence as irrelevant. On appeal, the Supreme Court first construed the Emergency Price Control Act to preclude the accused from challenging the validity of a price regulation in a prosecution for violation of the Act.²⁰⁰ The Court was then squarely confronted with the issue of whether such a statutory scheme contravened either fifth amendment due process requirements, the sixth amendment guarantees, or the separation of powers.

In an opinion authored by Chief Justice Stone, the majority in *Yakus* found, over the dissents of three justices, that the statutory scheme neither contravened the constitutional guar-

¹⁹⁷321 U.S. 414 (1944).

¹⁹⁸See also *Bowles v. Willingham*, 321 U.S. 503 (1944).

¹⁹⁹321 U.S. at 428-31.

²⁰⁰*Id.* at 429-31.

antees of criminal defendants set forth in the fifth and sixth amendments nor invaded any judicial prerogatives. While predicated his reasoning, in part, on the exigent circumstances of war,²⁰¹ Chief Justice Stone reasoned that the accused defendants had an opportunity for a hearing on their defense—a hearing before the Administrator. As he phrased the standard, "Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process."²⁰² Despite the fact that the Court had before it a criminal prosecution, almost every case cited in the Court's opinion on these important constitutional issues was civil in nature.²⁰³ Basically, Chief Justice Stone's opinion treated the case as raising administrative law rather than criminal procedure issues. Indeed, the Court's opinion is totally void of any reference to its prior decision in *Cooke* or the principles announced in that case. In any event, Chief Justice Stone's reasoning did accept the general notion that due process of law in a criminal case encompassed "a reasonable opportunity to be heard and present evidence."²⁰⁴ However, in his view, it was not necessary that the opportunity to be heard on matters of law be afforded in the criminal trial itself. So long as an ancillary opportunity to challenge the validity of the price regulations existed prior to the criminal trial, as it did in *Yakus*, due process was satisfied under Chief Justice Stone's analysis. Thus, the existence of the protest procedure under the Act, even though no longer available to the defendants, satisfied the constitutional requirements, absent any showing of unfairness in the administrative hearing procedure. The inconvenience to the defendants of having to challenge the price regulations in the distant forum of Washington, D.C., was said to be of lesser importance than the public interest in assuring a unitary and rapid scheme of review for the price regulations during a national emergency.²⁰⁵

The majority also rapidly disposed of the challenge predicated on the sixth amendment right to jury trial. The Court's analysis seemed to be that the jury had only to decide whether the defendants had willfully violated a valid price regulation promulgated

²⁰¹Id. at 431-33.

²⁰²Id. at 433.

²⁰³See *id.* at 433, citing *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937); *First Nat'l Bank v. Weld County*, 264 U.S. 450 (1924); and *Bradley v. City of Richmond*, 227 U.S. 477 (1913). See also *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300 (1937); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); and *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), cited at 321 U.S. at 434-35.

²⁰⁴321 U.S. at 433.

²⁰⁵Id. at 437 n.5.

by the Administrator.²⁰⁶ The unarticulated premise of the Court's argument was that the jury would never consider the issue of the validity of the regulation since it was solely an issue of law, and, therefore, the defendant lost nothing by transferring the forum for litigation of any such challenge from the criminal trial to the administrative and judicial processes provided under the Act. Unfortunately, the Court failed to consider that the rights guaranteed by the sixth amendment and by article III, section 2, clause 3 of the Constitution also require a trial to be held in the district where the crime was committed. In great part, these guarantees would have assured the defendants' access to local witnesses regarding local economic conditions who might otherwise have been unable or unwilling to attend an administrative proceeding in a distant forum such as Washington, D.C.

Justice Rutledge, joined by Justice Murphy, dissented from the Court's decision,²⁰⁷ arguing forcefully that the "dissection of the trial for crime"²⁰⁸ into two parts—one criminal and one administrative—violated the defendants' right to a fair trial by jury under the fifth and sixth amendments. Protesting that "the would-be offender is subject to criminal prosecution without a right to question in the criminal trial the constitutionality of the regulation on which his prosecution and conviction hinge,"²⁰⁹ Justice Rutledge urged that the summary proceeding in which the petitioner was required to challenge the price regulation violated many of the traditional protections of criminal defendants, including the article III and sixth amendment rights to a jury trial in the state and district in which the crime was committed,²¹⁰ the right to confrontation,²¹¹ and the right to present evidence.²¹² However, most important was the stress Justice Rutledge's dissent placed upon the Act's adverse impact on the ability of the criminal defendant to present a full and fair defense:

[To] state the question often is to decide it . . . It is whether, by substituting that civil proceeding for decision of basic issues in the criminal trial itself, Congress can foreclose the accused from having them decided in that trial and thereby deprive him of the protections in trial guar-

²⁰⁶*Id.* at 447-48.

²⁰⁷Justice Roberts, in a separate dissenting opinion, stated his belief that the procedures for challenging the validity of the price regulations were unconstitutional. However, the bulk of his dissent focused upon other aspects of the statutory scheme and the issue of whether they were properly justified under the war powers. *Id.* at 448-60 (Roberts, J., dissenting).

²⁰⁸*Id.* at 481 (Rutledge, J., dissenting).

²⁰⁹*Id.* at 478.

²¹⁰*Id.* at 479.

²¹¹*Cf. id.* at 480.

²¹²*Id.* at 481, 485.

anted all persons charged with crime and thus of full and adequate defense.²¹³

In short, the central flaw which Justices Rutledge and Murphy saw in the statutory scheme in question was the manner in which it operated to deprive the criminal defendant of his right to present a defense. Unfortunately, the majority opinion did not address this question. Thus, Justice Rutledge's dissent stands as one of the most important early pronouncements on the application of the right to present a defense in a context of partial exclusion of defense evidence.

The Court had few occasions to address constitutional challenges to the exclusion of defense evidence in state prosecutions prior to 1960, but the Court's opinions in the cases it did review are more satisfactory than *Yakus* and are illuminating because they seem to establish a pattern of analysis which was carried forward in the post-1960 cases. In *Powell v. Alabama*,²¹⁴ the Court observed that the manner in which the defendants' trial had been conducted substantially interfered with the opportunity to defend. Citing *Cooke*, the Court noted that due process of law required an opportunity to defend or explain.²¹⁵ However, *Powell* was grounded upon the denial of the right to counsel, which resulted from the lack of any appointment of a specific attorney for the defendant until the day of trial, rather than upon the right to present a defense. Thus, the Court chose to predicate its decision on a right expressly enumerated in the sixth amendment and guaranteed by the fourteenth amendment. Similarly, in *Gibbs v. Burke*,²¹⁶ one of the issues raised in a collateral challenge to a Pennsylvania conviction for larceny was a ruling by the state trial judge excluding evidence that the complaining witness had previously made a similar baseless charge against the accused. While the Supreme Court found the excluded evidence "clearly relevant" to the defense based on a theory of consent,²¹⁷ and held the exclusion to be erroneous, the Court did not rest its decision on a denial of the right to present a defense. Rather, the Court

²¹³*Id.* at 482-83. Justice Rutledge also said:

[I]n view of the statute's curtailment of his substantive rights and the consequent increase in the burden of proving facts sufficient to nullify the regulation, his chance for escape becomes remote, to say the least. In view of all these resources and advantages, the assertion hardly is sustained that enforcement requires also depriving the accused of his opportunity for full and adequate defense in his criminal trial.

Id. at 486-87 (emphasis added.).

²¹⁴287 U.S. 45 (1932).

²¹⁵*Id.* at 69.

²¹⁶337 U.S. 773 (1949).

²¹⁷*Id.* at 777.

again grounded its holding on the denial of the right to counsel. Thus, when the Supreme Court initially rejected partial exclusions of defense evidence the Court tended to seize upon the readily available and familiar specific guarantees of the Bill of Rights. Aside from its discussions in *Cooke* and *Oliver*, the Court virtually ignored until the 1960's the due process basis of the right to present a defense, at least in the context of a criminal trial.²¹⁸ And even many of the post-1960 cases were decided on the express guarantees enumerated in the fifth or sixth amendments to the United States Constitution, rather than on the impairment of the defendant's ability to defend himself.

C. Criminal Procedure in the Supreme Court Since 1960: The Emergence of the Right To Present a Defense

Not surprisingly, the flood of state criminal prosecutions reaching the Supreme Court on direct review or by collateral attack since 1960 presented a number of cases in which the accused had somehow been deprived of the opportunity to present significant evidence in his own behalf. Almost uniformly since 1960, the Court has viewed such deprivations unfavorably and has rather consistently protected the right to present a defense without express reference to that right. The Court's actions betoken an effort to protect the accused's opportunity to present all relevant material in his own defense. However, the bases of the Court's decisions, at least until *Webb v. Texas*²¹⁹ and *Chambers v. Mississippi*,²²⁰ did little to advance the protection of this right because the common rationale of the cases was not a general analysis of the fundamental nature of the right to defend. Instead, the cases were predicated on an expansion of the express guarantees of the fifth and sixth amendments to cover the facts of each one. This mode of analysis, of course, often strained beyond recognition the language of the fifth and sixth amendment guarantees.

In light of the body of case law already developed in the criminal and civil contempt areas regarding the due process right to be heard, the Court's failure to analyze on due process grounds criminal cases raising right to defend issues is somewhat curious. However, the Court's reluctance to return to such due process cases as *In re Oliver*²²¹ and *Cooke v. United States*²²² during the 1960's is partially explained by the history of the development during the 1960's of the incorporation doctrine. Although the incorporation doctrine began as a means by which the Court could

²¹⁸But see *Cole v. Arkansas*, 333 U.S. 196 (1948). See note 196 *supra*.

²¹⁹409 U.S. 95 (1972).

²²⁰410 U.S. 284 (1973).

²²¹333 U.S. 257 (1948).

²²²267 U.S. 517 (1925).

apply some of the more fundamental guarantees of the fifth and sixth amendments to the states,²²³ in addition to whatever other procedural protections the due process clause provided,²²⁴ the Supreme Court during the 1960's came to regard the incorporation doctrine as virtually the *sole* means of analyzing constitutional rights applicable to state criminal procedure.²²⁵ Thus, as the following discussion demonstrates, the Court during this period commonly attempted to resolve criminal procedure problems by finding an express guarantee on which to rest its decision rather than by discussing concepts of fundamental fairness which would have permitted its decisions to be grounded on the broad and flexible concepts of the due process clauses of the fifth and fourteenth amendments.

In *Ferguson v. Georgia*,²²⁶ the Supreme Court was confronted in 1961 with a case involving the Georgia rule that precluded the defendant from giving sworn testimony in a criminal case.²²⁷ The Georgia testimonial disqualification rule at issue in *Ferguson* was

²²³See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

²²⁴Cf. *Rochin v. California*, 342 U.S. 165 (1952); *Hurtado v. California*, 110 U.S. 516 (1884).

²²⁵Compare *Schmerber v. California*, 384 U.S. 757 (1966), with *Rochin v. California*, 342 U.S. 165 (1952). But see *Sheppard v. Maxwell*, 384 U.S. 388 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Brady v. Maryland*, 373 U.S. 83 (1963). See also *Malloy v. Hogan*, 378 U.S. 1 (1964). In *Washington v. Texas*, 388 U.S. 14 (1967), the Court said: "[I]n recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law." *Id.* at 18. Thus, with rare exceptions noted above, the criminal procedure decisions of the Supreme Court during the 1960's commonly looked to the specific guarantees of the fifth and sixth amendments to determine what process was due under the fourteenth amendment.

²²⁶365 U.S. 570 (1961).

²²⁷The Georgia rules prohibiting the accused from giving sworn testimony but permitting him to make an unsworn statement to the jury had, by the end of the nineteenth century, become historical anomalies in American criminal practice. As late as 1881, the Georgia Supreme Court held that the accused's right to address the jury was not limited by traditional evidentiary rules and clearly indicated that the defendant was to be given broad leeway in his statement. See *Hackney v. State*, 101 Ga. 512, 519-20, 28 S.E. 1007, 1010 (1897); *Coxwell v. State*, 66 Ga. 309, 316 (1881). Later, procedural rules began to infringe upon the defendant's unrestricted freedom in his address to the jury. See *Saunders v. State*, 172 Ga. 770, 158 S.E. 791 (1931); *Vincent v. State*, 153 Ga. 278, 293, 112 S.E. 120, 127 (1922); *Dunwoody v. State*, 118 Ga. 308, 45 S.E. 412 (1903); *Curtis v. State*, 48 Ga. App. 135, 137-38, 172 S.E. 99, 100 (1933); *Theis v. State*, 45 Ga. App. 364, 164 S.E. 456 (1932). By the time the United States Supreme Court decided *Ferguson v. Georgia*, 365 U.S. 570 (1961), the Georgia statement procedure had become little more than a means of permitting the defendant to testify without being sworn, as the Supreme Court recognized. *Id.* at 590-91.

the last vestigial remnant of the English sixteenth and seventeenth century common law practice in the United States.²²⁸ The defendant was not, however, totally precluded from addressing the jury since the Georgia statute, consistent with the common law experience, permitted the accused to address the jury and court and make "such statement in the case as he may deem proper in his defense."²²⁹ Under Georgia law, the accused's statement was entitled to whatever force the jury chose to give it.²³⁰ The Georgia practice had the advantage of preventing the accused from being cross-examined involuntarily,²³¹ but twentieth century Georgia decisions had detrimentally limited the defendant's scope of comment to those matters which, if offered in evidence, would be admissible.²³²

The petitioner in *Ferguson* had been convicted of murder and sentenced to death. At trial the defendant had sought, as part of his unsworn statement to the jury, to be examined by his counsel; however, the trial judge denied the accused's request and thereby limited counsel's role to merely advising his client in the formulation of the client's statement. As the concurring opinion in *Ferguson* notes,²³³ the petitioner had not sought to be examined as a sworn witness but merely requested counsel's assistance in the form of questions in presenting the unsworn statement to the jurors. Thus, as the majority viewed the case, the only issue posed was the constitutionality of preventing defense counsel from assisting the accused during his statement to the jury. As the majority read the record, the constitutionality of Georgia's testimonial disqualification of the accused was not at issue. Therefore, Justice Brennan's opinion for the Court, although setting forth an extensive and quite scholarly treatment of the history behind the common law testimonial incompetency of the accused,²³⁴ carefully

²²⁸See generally 365 U.S. at 577 & n.6.

²²⁹[1878-79] Ga. Acts 53 (codified as amended GA. CODE ANN. § 38-415 (1974)).

²³⁰See, e.g., *Vaughn v. State*, 88 Ga. 731, 734, 16 S.E. 64, 66 (1892); *Underwood v. State*, 88 Ga. 47, 57, 13 S.E. 856, 858 (1891).

²³¹[1878-79] Ga. Acts 53 (codified as amended GA. CODE ANN. § 38-415 (1974)).

²³²See note 227 *supra*.

²³³365 U.S. at 601 (Frankfurter, J., concurring); *id.* at 601-03 (Clark, J., concurring).

²³⁴*Id.* at 573-85. While Justice Brennan's recitation of the history of the accused's testimonial disqualification rule follows quite closely the history in sections I and II of this Article, there appears to be one slight historical error evident in Justice Brennan's opinion. Relying on 2 WIGMORE, *supra* note 23, § 575, Justice Brennan suggests that the accused's testimonial disqualification was a direct descendant of older modes of trial such as compurgation and wager of law. 365 U.S. at 573. These modes of trial were essentially swearing contests of the compurgators for each side in which numbers, not

based the holding upon denial of the right to have counsel question the accused during his unsworn statement to the jury.²³⁵ The Court held the right to counsel applicable to an unsworn statement and, therefore, the refusal to permit the "guiding hand of counsel"²³⁶ at this stage of the prosecution violated the sixth and fourteenth amendments.²³⁷

The Court stressed that an accused making his unsworn statement faced many pitfalls that could be obviated by counsel's assistance. The Court observed that, under Georgia practice, the ac-

credibility, was dispositive. In this context it was, indeed, thought unseemly to present the defendant to lend his oath to increase the number of his compurgators. See notes 7-11 *supra* and accompanying text. However, the testimonial disqualification of the accused, although posing an interesting analogy to trial by compurgation, does not seem to be the product of that practice. It is more probable that the origins lie elsewhere in the history of English criminal procedure. When the trial evolved to the point of accepting the testimony of witnesses under oath and weighing credibility, the criminal practice initially permitted only witnesses for the prosecution to be heard. This trial procedure was imposed either because it was thought treasonous to permit witnesses to give sworn testimony against the Crown or because the prosecution had the burden of demonstrating the accused's guilt so convincingly that no defense was thought necessary. See notes 26-27 *supra* and accompanying text. It is from this procedural practice that the accused's disqualification emerged. As the proscription on presenting defense witnesses was gradually dropped in 17th and 18th century England, testimonial competency was extended only to the accused's witnesses, not to the accused himself. The failure to remove the disqualification from the accused until the 19th century was the result of fears of perjury due to the accused's obvious interest in the trial's outcome, as well as concern over potential self-incrimination. *See generally* 1 STEPHEN, GENERAL VIEW, *supra* note 7, at 187-88. Thus, the testimonial disqualification of the accused was a holdover from the era when the defendant's witnesses were excluded altogether from the trial. That this practice had absolutely no connection with trial by compurgation is evident from the fact that, by its very nature, the compurgation contest required compurgators for both sides to be sworn and state their oaths.

²³⁵365 U.S. at 572, 596.

²³⁶*Id.* at 594, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

²³⁷The Georgia legislative response to *Ferguson* indicates that the state apparently read *Ferguson* as declaring unconstitutional the state incompetency provisions rather than as a mere limitation of the statute to require the right to counsel. In 1962, the statute was amended to eliminate the accused's testimonial incompetency and to permit him at his option to either testify or give an unsworn statement. The revision also provided a statutory privilege against being compelled to testify. [1962] Ga. Acts 133-34 (codified as amended at GA. CODE ANN. § 38-415 (1974)). The statute was further amended in 1973 to allow an accused to make an unsworn statement to the jury after he has already testified in his own behalf only if he has presented no other evidence. In that context he is apparently permitted to make the defense's closing argument. [1973] Ga. Acts 292, 294 (codified at GA. CODE ANN. § 38-415 (1974)). The current statute may raise further significant constitutional difficulties. Cf. *Brooks v. Tennessee*, 406 U.S. 605 (1972).

cused's scope of comment was substantially circumscribed by the rules of evidence.²³⁸ Furthermore, the Court noted the significant potential for self-incrimination in the accused's statement and that Georgia law recognized that potential and bound the accused to any admission contained in his statement.²³⁹ Another potential pitfall noted was that Georgia practice permitted the prosecution to introduce rebuttal evidence, otherwise inadmissible, to refute false statements made by the defendant in his statement.²⁴⁰ However, the most significant obstacle noted by the Court was that the lack of counsel's guidance in presenting the accused's statement often precluded him from having "the opportunity to try to exculpate himself by an explanation delivered in an organized, complete and coherent way."²⁴¹ Precluding defense counsel from either examining the accused or reminding him of elements of his defense for inclusion in his statement prevented the accused from presenting his defense in an organized, complete, and coherent fashion. The Court also pointedly noted that Georgia practice permitted the trial judge to preclude the accused from making a supplemental statement consisting of subject matter suggested by defense counsel.²⁴²

The Court's decision in *Ferguson*, while formally predicated on the right to counsel, rested in great part on the fear that an accused, making a statement without counsel's assistance "may fail properly to introduce, or to introduce at all, what may be a perfect defense."²⁴³ Thus, the Court feared that an innocent defendant could be convicted under the Georgia practice "because he does not know how to establish his innocence."²⁴⁴

While Justice Brennan's opinion in *Ferguson* rests on the right to counsel, it is evident that the desire to assure that the accused's defense is fully presented played a major role in swaying the Court. On the other hand, *Ferguson* clearly does not purport to articulate any new substantive doctrine regarding the right to present a defense. Justice Brennan carefully limited the Court's holding, as noted above, to the application of the right to counsel to the Georgia unsworn statement practice. Such a limitation followed the earlier pattern of resting right to defend cases on the express and specific guarantee of the right to counsel protected by the sixth amendment and the due process clause of the fourteenth amendment.

²³⁸365 U.S. at 590.

²³⁹*Id.* at 590-91.

²⁴⁰*Id.* at 591.

²⁴¹*Id.*

²⁴²*Id.* at 592, citing *August v. State*, 20 Ga. App. 168, 92 S.E. 956 (1917).

²⁴³365 U.S. at 595.

²⁴⁴*Id.*, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

The limitation of the Court's holding had a costly result. For example, Justice Brennan did not squarely address the Georgia testimonial disqualification rule²⁴⁵ which was the real impediment to the accused's ability to present his defense because the majority clearly did not think that the procedural posture of the case raised the constitutionality of that rule.²⁴⁶ Yet, as the Court seemingly recognized, it was this rule, rather than the exclusion of counsel's participation in the making of the unsworn statement, which hindered the accused in presenting his defense and convincing the jury of his innocence. Since the defendant's statement was unsworn, it did not have to be believed and could be ignored by the jury under Georgia law. Furthermore, the accused's statement was, with his consent, subject to cross-examination under Georgia practice; however, the accused had no means of compelling the state to cross-examine where he deemed it a desirable method of bolstering his statement.²⁴⁷ Thus, the Court noted that the testimonial disqualification rule so undermined the Georgia unsworn statement procedure that "in practice [the unsworn statement of the accused] is worth, generally, but little if anything to defendants."²⁴⁸

The devastating impact of the Georgia testimonial disqualification rule on the accused's ability to defend himself, when coupled with the practice of limiting the accused's statement to matters which might be properly admitted into evidence, apparently concerned Justices Frankfurter and Clark even more than the denial of the right to counsel. Thus, they concurred in the result on the ground that the Georgia testimonial disqualification rule was unconstitutional. Justice Frankfurter framed the issue this way:

This is not a right-to-counsel case What is in controversy here is the adequacy of an inextricably unified scheme of Georgia criminal procedure. The right to make an unsworn statement, provided by § 38-415, is an attempt to ameliorate the harsh consequences of the incompetency rule of the section following. Standing alone, § 38-415 raises no constitutional difficulty. Only when considered in the context of the incompetency provision does it take on meaning. If Georgia may constitutionally altogether bar an accused from establishing his innocence as a witness, it goes beyond its constitutional duty if it al-

²⁴⁵[1866] Ga. Acts 133, 135 (repealed 1962).

²⁴⁶365 U.S. at 572.

²⁴⁷*Id.* at 592, *citing* Boyers v. State, 198 Ga. 838, 844-45, 33 S.E.2d 251, 255-56 (1945).

²⁴⁸365 U.S. at 587, *quoting* Bird v. State, 50 Ga. 585, 589 (1874).

lows him to make a speech to the jury whether or not aided by counsel.²⁴⁹

The issue of the measure of the constitutional protection for the accused's right to defend himself was squarely framed by Justice Frankfurter; however, his opinion was devoted primarily to arguing that the issue of the constitutionality of the Georgia incompetency statute was properly raised.²⁵⁰ Thus, Justice Frankfurter's opinion did not address the issue he posed—the constitutionality of the Georgia incompetency rule. That task was left to Justice Clark, in whose concurring opinion Justice Frankfurter joined. Justice Clark would have ruled the incompetency provision unconstitutional on due process grounds. Unfortunately, his opinion provided no analytical support for his conclusion. Rather, he simply stated his conclusion:

Reaching the basic issue of incompetency, as I feel one must, I do not hesitate to state that in my view § 38-416 does not meet the requirements of due process and that, as an unsatisfactory remnant of an age gone by, it must fall as surely as does its palliative, § 38-415.²⁵¹

How did the incompetency rule violate due process of law? What test did Justice Clark apply? Neither of these questions is addressed in his opinion. Justice Clark cited no cases and provided no analysis in support of his conclusion. His opinion conveys a recognition of the fundamental unfairness to the accused resulting from preventing him from testifying, but he did not develop a satisfying analytical framework for the problem. It appears that Justice Clark was searching for the right to present a defense but stopped just short of its discovery. Case support for his conclusion already existed in the *McVeigh*²⁵² cases, *Cooke v. United States*²⁵³ and *In re Oliver*²⁵⁴ but, because of his failure to

²⁴⁹365 U.S. at 599 (Frankfurter, J., concurring).

²⁵⁰Justice Frankfurter argued that it is simply "formalism run riot to find that the division into two separate [statutory] sections of what is organically inseparable may not for reviewing purpose be treated as a single, appealable unit." *Id.* at 600. Alternatively, he would have dismissed the appeal for want of a substantial federal question since "considered *in vacuo*, § 38-415 fails, as has been pointed out, to present any reasonable doubts as to its constitutionality, for it provides only an additional right." *Id.* Thus, Justice Frankfurter, never known as a Justice who easily dispensed with procedural niceties, took issue with the majority's narrow view of the issue available for decision.

²⁵¹365 U.S. at 602. (Clark, J., concurring).

²⁵²Windsor v. McVeigh, 93 U.S. 274 (1876); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870).

²⁵³267 U.S. 517 (1925).

²⁵⁴333 U.S. 257 (1948).

cite these cases or to otherwise explain his analysis, Justice Clark missed an opportunity to establish the major theoretical framework for analysis of obstacles to the presentation of an accused's defense.

The failure of the various opinions in *Ferguson* to analyze the case from the standpoint of the right to present a defense continued the pattern established in earlier cases of grounding criminal procedure decisions on specific fifth and sixth amendment guarantees,²⁵⁵ and of using the incorporation doctrine to make those express guarantees applicable to the states.²⁵⁶ This type of analysis continued throughout the 1960's and often resulted, as discussed below, in decisions based on specific guarantees which seemed to have little applicability to the problem at hand,²⁵⁷ thereby straining the language of the fifth and sixth amendments beyond the limits of credible analysis. This strain could have been avoided by an early recognition in *Ferguson* of a due process right to present a defense.

The Court's next opportunity to address the right to present a defense arose in the context of a group of cases challenging special recidivist and sexual offender sentencing statutes under which defendants had been sentenced to terms longer than those normally prescribed for the offense committed. Relying in part on its prior decision in *Chandler v. Fretag*,²⁵⁸ the Court in *Oyler v. Boles*²⁵⁹ and *Specht v. Patterson*²⁶⁰ held that a defendant sentenced pursuant to special sentencing statutes must be afforded "an opportunity to be heard"²⁶¹ as a matter of due process of law. In *Oyler*, the Court found that the West Virginia recidivist sentencing procedure afforded a sufficient opportunity to be heard and therefore satisfied constitutional requirements. However, the Colorado Sex Offenders Act at issue in *Specht* permitted summary sentencing as a sex offender if the trial court was "of the opinion that any . . . person [convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the

²⁵⁵See *Gibbs v. Burke*, 337 U.S. 773 (1949); *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁵⁶During the 1960's the Court increasingly and almost exclusively analyzed problems of state criminal procedure posed under the fourteenth amendment by engaging in an exploration of the specific guarantees of the Bill of Rights to determine which of them might be incorporated into the due process clause. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁵⁷See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972).

²⁵⁸348 U.S. 3 (1954) (due process requires opportunity to obtain counsel for recidivist sentencing hearing). See also *Chechning v. Cunningham*, 368 U.S. 443 (1962).

²⁵⁹368 U.S. 448 (1962).

²⁶⁰386 U.S. 605 (1967).

²⁶¹368 U.S. at 452.

public, or is an habitual offender and mentally ill.²⁶² The only procedural requirement demanded by the Colorado statute before the trial court could impose an indeterminate sentence of one day to life required the court to secure a written psychiatric report, which included the examining psychiatrist's opinion as to whether the accused should be committed to a mental facility or was capable of supervision on probation. Stressing that the determination of the offender's status as a physical threat to the public or as a mentally ill recidivist is an issue separate and apart from the guilt of the substantive offense,²⁶³ the Court, in an opinion by Justice Douglas, held that the Colorado procedure denied the petitioner due process because it denied the accused the opportunity to be heard, to offer evidence, and the rights to counsel and cross-examination.²⁶⁴

Neither *Oyler* nor *Specht* contributed any significant analytical development to the right to present a defense. However, in these cases the Court did extend directly into the criminal process the concept, previously applied in civil cases and criminal contempt cases, that due process of law required the opportunity to be heard. This extension was certainly not an extraordinary leap from criminal contempt cases as *Cooke* and *Oliver*.²⁶⁵ As in *Cooke* and *Oliver*, the sentencing procedures in *Specht* prevented the defendant from introducing any evidence whatsoever on the issues posed by the Colorado Sex Offenders Act. Neither *Oyler* nor *Specht* involved the more complex question of partial exclusion of the defense case.

The Supreme Court confronted a *partial exclusion* case in 1967 when, in deciding *Washington v. Texas*,²⁶⁶ the Court considered the application of the Texas statutory rule²⁶⁷ which prevented principals, accomplices, or accessories in the same crime from testifying

²⁶²Ch. 89, § 1, [1953] Colo. Laws 249 (repealed 1968).

²⁶³386 U.S. at 608-10. This point was vital because it permitted the Court to harmonize its decision with its prior opinion in *Williams v. New York*, 337 U.S. 241 (1949), holding that due process did not require an opportunity to be heard or even a hearing regarding traditional sentencing.

²⁶⁴386 U.S. at 610.

²⁶⁵Interestingly, neither of these cases was cited by the majority of the Court in either *Oyler* or *Specht*.

²⁶⁶388 U.S. 14 (1967).

²⁶⁷Tex. Penal Code art. 82 (1952) (repealed 1967). The 1925 Texas Code of Criminal Procedure, article 711 (repealed 1965), provided a similar disqualification but permitted testimony of accomplices, accessories, or coprincipals on the behalf of the accused if the witness had been previously acquitted or the charges had been dismissed. Similarly, the 1925 Code, article 716, permitted such witnesses to testify for the accused, even if convicted, where the punishment imposed was only a fine which had already been paid.

in behalf of each other.²⁶⁸ The petitioner, Jackie Washington, had been convicted of murder after the highly exculpatory testimony of a coprincipal, Charles Fuller, had been excluded. The facts of the case indicate that only Fuller, Washington, and the decedent were present at the scene of the crime. Washington's defense was that Fuller had fired the fatal shot and that Washington, although bearing a personal grudge against the decedent over the loss of his girlfriend, had attempted to prevent the shooting. Other evidence partially corroborated that version of the facts. It was Fuller's shotgun which was involved in the shooting and Fuller had approached and left the scene of the shooting carrying that shotgun. At the trial, Washington sought as part of his defense to call Fuller, the only other living witness to the shooting, in order to have him testify that the accused had tried to pull Fuller away from the scene of the crime and had tried to persuade him to leave. Fuller would further have testified that the petitioner had run from the house before Fuller fired the fatal shot. The petitioner's efforts to have Fuller verify his defense ran head-long into the roadblock of the Texas accomplice disqualification statute and, accordingly, Fuller's testimony was excluded. Thus, the issue framed in *Washington* presented the problem of the right of the criminally accused to present a defense in its most common and graphic form—the conflict of an evidentiary rule with the accused's efforts to introduce exculpatory testimony.

Finding that Fuller's testimony was "relevant and material, and that it was vital to the defense,"²⁶⁹ Chief Justice Warren, speaking for a unanimous Court,²⁷⁰ held that the application of the Texas statute to this case²⁷¹ violated the petitioner's right

²⁶⁸As the Court's opinion noted, the Texas procedure permitted accomplices or coprincipals to testify for the state against other accomplices or principals. Furthermore, the Texas disqualification rule applied whether the coprincipal, accomplice, or co-accessory was charged "in the same or by different indictments" (i.e., whether the trials were joint or several). 388 U.S. at 22 & n.20.

²⁶⁹*Id.* at 16.

²⁷⁰Justice Harlan's concurring opinion is discussed at text accompanying note 291 *infra*.

²⁷¹While the clear impact of the Court's opinion in *Washington* was that the Texas accomplice disqualification statute, Tex. Penal Code art. 82 (1952) (repealed 1967), was facially unconstitutional, the Court never expressly so held. Rather, the Court merely stated that "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23. Even the way in which the Court framed the issue—"whether [the right to compulsory process] was violated in the circumstances of this case," *id.* at 19, suggests that the Court did not view itself as ruling on the facial constitutionality of the statute but was concerned with the constitutionality

to compulsory process, which the Court simultaneously found to be incorporated into the fourteenth amendment's due process clause.²⁷² In deciding that Texas's refusal to permit Fuller to testify for the petitioner violated the right to compulsory process, the Court strained the history and language of the sixth amendment somewhat. Chief Justice Warren urged that resolution of the question "require[d] some discussion of the common-law context in which the Sixth Amendment was adopted,"²⁷³ and then proceeded to discuss the history of the rules excluding defense witnesses, a practice which ended in 1701 as the Court notes.²⁷⁴ Chief Justice Warren then pointed out that the common law contained disqualifications based on interest of defendants and co-defendants.²⁷⁵ While the Chief Justice was correct in his statement that the disqualification of defendants was a relic of the common law disqualification rules, he was incorrect in suggesting that the Texas disqualification rule preventing accomplices and accessories from testifying for the accused was a holdover from the common law. After 1701, the common law disqualified accomplices and accessories from testifying on behalf of other co-accomplices only where they were jointly tried.²⁷⁶ Even then, the disqualification stemmed not from their status as accessories or accomplices, but from their disqualifications as defendants testifying in their *own* trials. Thus, if a severance had been secured, they could testify on behalf of codefendants, coprincipals or other accessories. However, after the abolition of the disqualification of the accused in the late nineteenth century, the question of whether the disqualification of codefendants had also been abolished frequently arose. While the majority of the courts said that it had been,²⁷⁷ a few jurisdictions held to the contrary.²⁷⁸ Texas seems to have been the only state to give a negative statutory response to this issue. Therefore, the origins of the Texas accomplice disqualification rule lay not in the common law dis-

of the application of the statute to the petitioner's case. The reason for the Court's failure to decide the facial constitutionality of the Texas statute seems to be that the statute had been repealed by the time the case reached the Court. 388 U.S. at 16 n.4.

²⁷²388 U.S. at 17-19.

²⁷³*Id.* at 19.

²⁷⁴*Id.* at 20 n.13.

²⁷⁵*Id.* at 20.

²⁷⁶See generally 2 WIGMORE, *supra* note 23, § 580, at 707-10.

²⁷⁷See generally cases collected in 2 *id.* § 580, at 713 n.15.

²⁷⁸See, e.g., *Ballard v. State*, 31 Fla. 266, 12 So. 865 (1893); *State v. La Rocca*, 168 La. 204, 121 So. 744 (1929); *State v. Dreher*, 166 La. 924, 118 So. 85 (1928); *State v. Breaux*, 104 La. 540, 29 So. 222 (1901); *State v. Angel*, 52 La. Ann. 485, 27 So. 214 (1899); *State v. Franks*, 51 S.C. 259, 28 S.E. 908 (1898).

qualification of *all* defense witnesses, but rather in late nineteenth century statutory developments regarding the testimonial enfranchisement of the accused. Thus, the problem posed in *Washington* was, like many of the modern obstacles to the accused's ability to present his defense, a result of post-Bill of Rights developments, unforeseen by the Framers of the sixth amendment. In discussing the federal evidentiary cases involving the accomplice disqualification rule, Chief Justice Warren totally ignored late nineteenth century procedural developments such as the testimonial enfranchisement of the accused. Thus, the Chief Justice asserted that in *United States v. Reid*,²⁷⁹ the "federal courts followed the common-law restrictions for a time, despite the Sixth amendment."²⁸⁰ He then noted that *Reid* was "not satisfactory to later generations"²⁸¹ and was overruled in *Rosen v. United States*²⁸² in 1918. In his analysis of the cases, Chief Justice Warren totally ignored the fact that the gradual but continuous elimination of the testimonial disqualification of the accused during the late nineteenth century wholly undermined *Reid* and set the stage for its overruling in *Rosen*.

Chief Justice Warren's historical view may have been crucial to his analysis, for he seemed to argue that the sixth amendment was in part deliberately intended to abolish the common law disqualification rules.²⁸³ Since the Texas rule was an outgrowth of late nineteenth century developments rather than pre-sixth amendment common law procedures, the argument that the sixth amendment was specifically intended to prevent such rules is simply untenable. In fact, based on the history of criminal procedure and the history of the sixth amendment, a good argument can be made that the sixth amendment was designed to do simply what it says—to grant the subpoena power to the accused which he lacked at common law.²⁸⁴

Although Chief Justice Warren's discussion of history was weak, the holding in *Washington* is clear and forthright—the sixth amendment right to compulsory process is violated by a state rule denying the accused the right to present a witness capable of giving material exculpatory testimony. Chief Justice Warren replied to the argument that the right to compulsory process

²⁷⁹53 U.S. (12 How.) 361 (1851), discussed at notes 155-64 *supra* and accompanying text.

²⁸⁰388 U.S. at 21.

²⁸¹*Id.*

²⁸²245 U.S. 467 (1918).

²⁸³388 U.S. at 19-20, relying in part on 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1786-88 (1st ed. 1833).

²⁸⁴See notes 114 & 16 *supra* and accompanying text.

was not denied in *Washington* because the accused had the right to subpoena witnesses, with the following statement:

The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.²⁸⁵

Chief Justice Warren's opinion does demonstrate the Court's sensitivity to the accused's right to present a defense. Citing *In re Oliver*,²⁸⁶ the Chief Justice stressed that the due process clause protected that right:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.²⁸⁷

Although the Chief Justice's forceful assertion of a due process foundation for the right to present a defense provided a significant step forward in recognizing and delineating the protection of that right, his invocation of the incorporation doctrine²⁸⁸ and consequent reliance on the sixth amendment compulsory process guarantee²⁸⁹ left significant doubt about the extent of the right to present a defense. Was the due process analysis invoked in *Washington* only applicable if one could find a specific guarantee in the Bill of Rights setting forth the protection at issue? Was the protection afforded by the compulsory process clause co-extensive with the right to present a defense? Would the compulsory process analysis be applied where the testimony of the accused's witnesses was only partially excluded?

Washington was easy to decide on sixth amendment principles. While the evidence excluded involved only part of Washington's total defense, the Texas statute, by disqualifying accomplices, co-principals, and accessories as defense witnesses was functionally equivalent to preventing the accused from compelling their at-

²⁸⁵388 U.S. at 23.

²⁸⁶333 U.S. 257 (1948), discussed at notes 193-96 *supra* and accompanying text.

²⁸⁷388 U.S. at 19.

²⁸⁸*Id.* at 17-18.

²⁸⁹*Id.* at 19-23.

tendance at trial. Obviously, a more difficult case is posed where the testimony of a defense witness is not totally excluded but is only partially excluded because of evidentiary rulings on issues such as hearsay or relevancy. It is doubtful that Chief Justice Warren was saying that the right to compulsory process governs such partial exclusions. Rather, the precise issue framed in *Washington* lent itself readily to analysis under the compulsory process clause. Yet the Chief Justice was troubled even by that limited rationale, since he noted that the Court's holding in *Washington* did not disapprove of traditional testimonial privileges or "nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them."²⁹⁰ If the right to present witnesses in one's own behalf is protected solely by the right to compulsory process and incorporation doctrine analysis, it is difficult to understand how the right to defend could be guaranteed in partial exclusion cases. One may search the Bill of Rights in vain for language expressly preventing partial evidentiary infringement of the right to defend. *Washington* therefore left unexplained major questions of how and when the accused's right to present a defense would be constitutionally protected. Would the due process clauses of the fifth and fourteenth amendments, coupled with the penumbras of the fifth and sixth amendments, be sufficient to defeat evidentiary rulings resulting in partial exclusions of testimony, or must one engage in the search for an express guarantee in the language of the fifth and sixth amendments? These issues were not to be addressed until the 1970's.

Characteristically, Justice Harlan's concurring opinion in *Washington* condemned the majority's reliance on the incorporation doctrine. He said:

In my opinion this is not, then, really a problem of "compulsory process" at all, although the Court's incorporationist approach leads it to strain this constitutional provision to reach these peculiar statutes.²⁹¹

However, rather than embarking on an exploration of the right to present a defense, Justice Harlan seized on the discriminatory impact of the Texas procedure which forbade the accused, but not the state, from utilizing the testimony of accomplices and

²⁹⁰*Id.* at 23 n.21. This footnote also might suggest that the rationale of the Court's decision in *Washington* had little to do with the right to compulsory process, but rather was predicated on the lack of reciprocity in the Texas statute—the state could utilize the testimony of accomplices, coprincipals, and accessories, but the accused could not. Cf. *Wardius v. Oregon*, 412 U.S. 470 (1973).

²⁹¹*Id.* at 24 (Harlan, J., concurring).

other potential co-defendants. Thus, Justice Harlan's concurrence was based on a fundamental fairness-due process analysis.

The Court next had occasion to comment on the right to present a defense in *Jenkins v. McKeithen*,²⁹² a case challenging the constitutionality of the statute creating the Louisiana Labor Management Commission of Inquiry.²⁹³ *Jenkins* was a civil suit. However, the case was directly relevant to questions of criminal procedure since the Commission served a quasi-criminal function. As the Court noted, the Commission's sole responsibility was to investigate criminal offenses in labor relations and to determine whether there was probable cause to believe criminal violations had occurred. The Commission's findings were public and were reported to proper state and federal prosecutorial agencies.²⁹⁴ The Commission's charter expressly precluded it from investigating "civil aspects of any labor problem."²⁹⁵ Thus, the Commission was solely a board of criminal inquiry, applying a grand-jury-type probable cause standard, but whose proceedings and findings were, unlike those of the grand jury, matters of public record. The Commission was challenged on a plethora of grounds, including nonconformity to procedures constitutionally guaranteed to an accused in a criminal trial. Relying on comments in the prior decision of *Hannah v. Larche*,²⁹⁶ the Court held that, because of the Commission's quasi-criminal role, it was required to observe the criminal guarantees made obligatory on the states by the fourteenth amendment due process clause. In his opinion, Justice Marshall enumerated the rights of the accused left unprotected by the Commission's rules.²⁹⁷ His enumeration included not only the sixth amendment guarantees of confrontation and cross-examina-

²⁹²395 U.S. 411 (1969).

²⁹³No. 2, § 880.6B, [1967] La. Acts 5 (repealed 1972).

²⁹⁴395 U.S. at 415-17.

²⁹⁵No. 2, § 880.6B, [1967] La. Acts 5 (repealed 1972).

²⁹⁶363 U.S. 420 (1960) (Frankfurter, J., concurring).

Were the [Civil Rights] Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecution might well be the controlling starting point for assessing the protection which the Commission's procedure provides.

Id. at 488.

²⁹⁷The decision was a 5-3 decision, and Justice Marshall's opinion was joined by only two other Justices—Chief Justice Warren and Justice Brennan. Justices Douglas and Black concurred in the result on procedural due process grounds. *Id.* at 432-33. Justices Harlan, Stewart, and White dissented.

tion²⁹⁸ but also the right "to present evidence on [one's] own behalf."²⁹⁹ Specifically, Justice Marshall wrote:

The Commission's procedures also drastically limit the right of a person investigated to present evidence on his own behalf. It is true that he may appear and call a "reasonable number of witnesses" in executive session, but should the Commission decide to hold a public hearing, he is limited to presentation of his own testimony and the "pertinent" written statements of others. The right to present oral testimony from other witnesses and the power to compel attendance of those witnesses may be denied in the discretion of the Commission. The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime. We do not mean to say that the Commission may not impose reasonable restrictions on the number of witnesses and on the substance of their testimony; we only hold that a person's right to present his case should not be left to the unfettered discretion of the Commission.³⁰⁰

Thus, Justice Marshall's opinion in *Jenkins* added more weight to the slowly emerging concept that the criminally accused has a due process right to present his defense without burdensome restrictions imposed by a hearing tribunal. However, *Jenkins* added little to the formulation of an analytical test for determining the point at which procedural or evidentiary rules or rulings violate that right. The analytical framework of the right to defend remained and would continue to remain doctrinally anemic.

The Court had several additional opportunities to address the problem of the right to present a defense during the late 1960's and the early 1970's in a number of cases raising challenges to limitations on the accused's efforts to cross-examine witnesses.³⁰¹ These cases, which were easily and properly analyzed under the confrontation clause of the sixth amendment, had an important impact on the accused's ability to present his defense through effective cross-examination. Interestingly, however, none of the major confrontation cases recently considered by the Court have

²⁹⁸395 U.S. at 428-29.

²⁹⁹*Id.* at 429.

³⁰⁰*Id.* (citations omitted).

³⁰¹See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

involved efforts to build by cross-examination a coherent defense based upon an alternative theory of the commission of the crime. Instead, these cases have more commonly involved attempts to discredit or impeach prosecution witnesses rather than to offer by cross-examination an alternative exculpatory theory of the crime.³⁰² Possibly for this reason, and because of the availability of the confrontation clause as a vehicle for decision, the concept of the right to defend was totally ignored in these cases.

Similarly, in *Williams v. Florida*³⁰³ and *Wardius v. Oregon*,³⁰⁴ the Court twice rejected an opportunity to discuss the right to present a defense in the context of the exclusion of defense evidence for procedural default. Both of these cases involved the constitutionality of state alibi-notice rules, which required the accused, in advance of trial, to give timely notice of his intention to rely on an alibi defense and the names and addresses of the defense witnesses who would be called to support the alibi.³⁰⁵ One possible sanction for the procedural default of failure to comply with alibi-notice statutes is the exclusion of the alibi evidence proffered by the accused. In both *Williams* and *Wardius*, the infringement on the right to present a defense occasioned by the preclusion sanctions was apparently pressed upon the Court, but the Court merely noted the issue in footnotes and reserved the question of the constitutionality of utilizing the sanction as a remedy for defense counsel's procedural default.³⁰⁶ Avoiding the question was

³⁰²See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *California v. Green*, 399 U.S. 149 (1970).

³⁰³399 U.S. 78 (1970).

³⁰⁴412 U.S. 470 (1973).

³⁰⁵*Williams v. Florida*, 399 U.S. 78 (1970), concerned the constitutionality of FLA. R. CRIM. P. 1.200 (now codified as FLA. R. CRIM. P. 3.200; *Wardius v. Oregon*, 412 U.S. 470 (1973), concerned the constitutionality of ORE. REV. STAT. § 135.875 (1969), as amended, ORE. REV. STAT. § 135.455 (1973).

³⁰⁶

We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. Cf. Brief for Amicus Curiae 17-26. It is enough that no such penalty was exacted here.

399 U.S. at 83 n.14.

Petitioner also argues that even if Oregon's notice-of-alibi rule were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial. But in light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced. Cf. *Williams v. Florida*, [399 U.S. 78,] 83 n.14 [(1970)].

419 U.S. at 472 n.4. But cf. *Nobles v. United States*, 422 U.S. 225, 241 (1975).

simple in *Williams* since no alibi evidence offered by the accused was excluded at his trial. However, in *Wardius* the accused was precluded, on account of his counsel's procedural default, from offering alibi witnesses and even from testifying in his own behalf regarding his alibi. The Court was able to avoid deciding the issue of the constitutionality of the "preclusion sanction" in *Wardius* only because the Court declared the Oregon alibi-notice statute unconstitutional under the due process clause of the fourteenth amendment.³⁰⁷ The Court found the statute to be unconstitutional because it failed to provide for reciprocal discovery on behalf of the accused. Resolving the question of the constitutionality of the preclusion sanction might have provided an excellent vehicle for delineating the analytical contours of the right to present a defense. However, the Court has to date always reserved this question, thereby leaving the constitutionality of the preclusion sanction in limbo.³⁰⁸

The Court missed another opportunity to develop a theory of the right to present a defense in *Brooks v. Tennessee*.³⁰⁹ In *Brooks*, the Court, in a 6-3 decision, held unconstitutional on fifth, sixth, and fourteenth amendment grounds a Tennessee statute³¹⁰ which required an accused desiring to testify in his own behalf to testify as the first defense witness. Specifically, the Court held that the Tennessee statute violated the privilege against self-incrimination and the right to counsel. The statute in question was apparently adopted simultaneously with Tennessee's decision in 1887 to permit the accused to give sworn testimony in his own behalf.³¹¹ Both the majority and the dissenters recognized that the justification for the Tennessee statute was an attempt to prevent the accused, motivated by his obvious interest in the outcome of the trial, from conforming his testimony to that of defense witnesses already heard.³¹² Yet, the majority, noting that many perfectly legitimate and important alternative reasons may impel an accused to de-

³⁰⁷See generally Note, *The Preclusion Sanction—A Violation of the Constitutional Right To Present a Defense*, 81 YALE L.J. 1342 (1972) [hereinafter cited as Note, *Preclusion Sanction*]. See also FED. R. CRIM. P. 12.1.

³⁰⁸See analysis at notes 547-601 *infra* and accompanying text.

³⁰⁹406 U.S. 605 (1972).

³¹⁰TENN. CODE ANN. § 40-2403 (1975).

³¹¹406 U.S. at 606 n.1. Interestingly, three of the Supreme Court's cases potentially involving the right to present a defense arose from the state responses to the common law rule which testimonially disenfranchised the accused. See *Brooks v. Tennessee*, 406 U.S. 605 (1972). *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Washington v. Texas*, 388 U.S. 14 (1967). *Washington* and *Brooks* both involved post-Bill of Rights evidentiary and procedural obstacles placed in the path of the accused's efforts to defend as part of the state's decision to render the accused competent as a witness.

³¹²406 U.S. at 607-08; *id.* 614 (Burger, C.J., dissenting); *id.* at 619 (Rehnquist, J., dissenting).

sire to testify last,³¹³ decided that the statute was unconstitutional. While this conclusion is not altogether unreasonable,³¹⁴ the incorporationist analysis adopted by Justice Brennan in his opinion for the Court appears to strain certain provisions of the fifth and sixth amendments beyond recognition.

The conceptual difficulty with the Court's holding that the Tennessee statute violated the fifth amendment privilege against self-incrimination was that the petitioner had not taken the stand and no adverse consequences or comment had followed from his silence. Thus, as Chief Justice Burger's dissenting opinion stressed,³¹⁵ it was difficult to see how the accused was "compelled . . . to be a witness against himself."³¹⁶ Justice Brennan's response to this inherent theoretical difficulty was to rely upon the dicta in several prior cases and to build upon their language. He noted that in prior cases the Court had said that the accused's fifth amendment self-incrimination privilege encompassed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence".³¹⁷ Accordingly, Justice Brennan reasoned that compelling the accused to take the stand first restricted his "unfettered" discretion in deciding whether to remain silent. Moreover, the accused's decision not to take the stand *initially* imposed on him under Tennessee procedure the grievous penalty of being precluded from testifying at all. Thus, the Tennessee rule "cuts down on the privilege [to remain silent] by making its assertion costly."³¹⁸

The Tennessee statute clearly posed significant strategic problems for the defendant, but Justice Brennan's reliance on

³¹³Justice Brennan's opinion for the Court noted that a defendant runs significant risks in testifying, such as opening the door to the admission of otherwise inadmissible evidence, including unlawfully secured confessions or his prior criminal record which might be used for impeachment. 406 U.S. at 609, *citing, inter alia*, *Harris v. New York*, 401 U.S. 222 (1971). Thus, the Court noted that an accused may desire to wait until his witnesses have testified in order to assess how convincing they appeared, how well they withstood cross-examination and even, in the case of hostile witnesses, what they have said, before the accused decides whether to take the stand. 406 U.S. at 609-10.

³¹⁴But see 406 U.S. at 613 (Burger, C.J., dissenting):
This case is an example of the Court's confusing what it does not approve with the demands of the Constitution. As a matter of choice and policy—if I were a legislator, for example—I would not vote for a statute like that the Court strikes down today. But I cannot accept the idea that the Constitution forbids the States to have such a statute.

³¹⁵*Id.* at 614.

³¹⁶U.S. CONST. amend. V.

³¹⁷406 U.S. at 609, *quoting Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

³¹⁸406 U.S. at 611, *quoting Griffin v. California*, 380 U.S. 609, 614 (1965).

the fifth amendment privilege against self-incrimination seems strained. *Brooks* was unlike the prior cases on which it relied. In the prior fifth amendment cases cited in *Brooks*,³¹⁹ the issue was the constitutionality of governmental action affecting the decision *whether* to testify. In *Brooks* the rule at issue affected *when*, not whether, the accused testified. Indeed, the *Brooks* holding is inconsistent with the Court's prior decision in *Williams v. Florida*,³²⁰ holding that the *timing* of defense disclosure did not raise fifth amendment questions. While the *timing* of the presentation of defense evidence may clearly have some relationship to the accused's decision *whether* to testify, they are analytically separate issues. Nothing in either the language or history of the fifth amendment suggests that the privilege against self-incrimination was intended to resolve both issues.³²¹

Despite its³²² unpersuasive reliance on the privilege against self-incrimination as a vehicle of decision, the Court's analysis in *Brooks* did contain the kernel of a viable test for deciding right to present a defense cases. In deciding that the Tennessee rule must yield to the fifth and fourteenth amendments, the Court said:

Although the Tennessee statute does reflect a state interest in preventing testimonial influence, we do not regard that interest as sufficient to override the defendant's right to remain silent at trial.³²³

Thus, the Court clearly adopted a balancing test to resolve the question at hand. The Court weighed the asserted state interest protected by its procedural rule against the injury the rule inflicted on the defendant's fifth amendment rights. The Court's use of

³¹⁹See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (adverse comment on the accused's silence unconstitutional).

³²⁰The majority's precise statement in *Williams v. Florida*, 399 U.S. 78 (1970), was:

Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

Id. at 85.

³²¹See generally LEVY, *supra* note 44.

³²²Justice Stewart concurred only in that portion of the Court's opinion which found that the Tennessee statute violated the sixth and fourteenth amendment guarantees. 406 U.S. at 613.

³²³*Id.* at 611. The Court's conclusion as to the resolution of this conflict of evidentiary and fifth amendment policies was facilitated by the fact that the Court regarded Tennessee as treating its interest as only minimally important since it permitted the statutory rule to be waived. *Id.* at 611 n.7, citing *Martin v. State*, 157 Tenn. 383, 8 S.W.2d 479 (1928).

a balancing approach in *Brooks* was therefore a significant foundation for later right to defend cases since it was a departure from the strict adherence in prior cases³²⁴ to grounding the right to defend analyses on per se approaches to specific guarantees of the fifth and sixth amendments. If the Court had forthrightly chosen the due process clause right to be heard as its counter-weight to the state procedural rule, rather than utilizing a strained self-incrimination privilege analysis, *Brooks* could have been the cornerstone of a cohesive analytical framework for the right to present a defense. However, Justice Brennan's choice of the incorporation doctrine as the vehicle for all fourteenth amendment due process cases led to the unconvincing choice of the privilege against self-incrimination as the primary vehicle for decision in *Brooks*. The right to present a defense, even though already peripherally mentioned in prior cases, was totally ignored in *Brooks*.

The privilege against self-incrimination was not the only grounds of decision in *Brooks*. The Court also relied on the sixth amendment right to the assistance of counsel in striking down the Tennessee statute. Relying on *Ferguson v. Georgia*³²⁵ and *Powell v. Alabama*,³²⁶ the Court found that the Tennessee statute deprived the accused of the "guiding hand of counsel" by preventing his lawyer from deciding when to call the accused to testify.³²⁷ The Court's reliance on the sixth amendment guarantee in *Brooks* was consistent with cases such as *Gibbs v. Burke*,³²⁸ which had previously seized upon the right to the assistance of counsel as a basis for decisions in cases fundamentally presenting issues about the right to present a defense. This vehicle of decision is as unconvincing as the privilege against self-incrimination. As Justice Rehnquist's dissent cogently argues,³²⁹ the Court's rationale ultimately seems to suggest that the defense counsel's strategic desires can override legislative and judicial judgments as to proper procedural or evidentiary rules.³³⁰

Although *Brooks* displayed a continuation of the Court's use of incorporation theories in right to defend cases and thereby prevented development of an analytical structure for such cases,³³¹ a

³²⁴See, e.g., *Washington v. Texas*, 388 U.S. 14 (1967); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

³²⁵365 U.S. 570 (1961).

³²⁶287 U.S. 45 (1932).

³²⁷406 U.S. at 612-13, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

³²⁸337 U.S. 773 (1949). See discussion at note 216 *supra* and accompanying text.

³²⁹406 U.S. at 617-20 (Rehnquist, J., dissenting).

³³⁰Cf. *Schmerber v. California*, 384 U.S. 757 (1966).

³³¹But see 406 U.S. at 618 (Rehnquist, J., dissenting):

I could understand, though I would not agree with, a holding that

trend away from sole reliance on the incorporation doctrine began after *Brooks*³³² and has laid the groundwork for a clearer analysis of the right to present a defense founded on the due process clause.

The clearest opportunity to fully define and delineate the contours of the right to defend finally came in three cases decided in 1972 and 1973.³³³ In two of these cases, the Court abandoned its incorporation doctrine approach and relied solely on the due process clause and the concomitant concept of the right to present a defense. By this time the concept that the due process clause protected against impairment of the opportunity to defend was not novel.³³⁴ The novelty in these three recent cases arose from the fact that the Court, for the first time, applied a right to defend analysis to procedural and evidentiary rulings which had only partially impaired the accused's opportunity to present a defense.

under these circumstances the Fourteenth Amendment conferred a right upon the defendant, counseled or not, to decide at what point during the presentation of his case to take the stand. But to cast the constitutional issue in terms of violation of the defendant's right to counsel suggests that defense counsel has an authority of constitutional dimension to determine the order of proof at trial.

³³²See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972); *Cool v. United States*, 409 U.S. 100 (1972). Despite the Court's pre-1972 reliance on the incorporation doctrine, the due process right to defend noted in prior cases did not slip into total dormancy. However, the right seemed to be reserved for cases in which the accused was *totally* deprived of the opportunity to defend. Thus, the Court continued to cut back the constitutionally permissible scope of summary contempt procedures. In *Groppi v. Leslie*, 404 U.S. 496 (1972), the Court unanimously (Justices Powell and Rehnquist took no part in the decision) held that the Wisconsin State Assembly could not constitutionally confine civil rights activist Father James E. Groppi by summarily voting a resolution finding him to be in contempt of the Assembly, although the citation was for conduct which had occurred on the assembly floor in a demonstration that had obstructed the legislature's functioning. Part of the opinion stressed the importance of procedural fairness to a respondent who was readily available and noted that "an opportunity to be heard in defense before punishment is imposed [is] 'basic in our system of jurisprudence.'" 404 U.S. at 502, quoting *In re Oliver*, 333 U.S. 257, 273, (1948). Similarly, in *Taylor v. Hayes*, 418 U.S. 488 (1974), the Court, relying on *Groppi*, held that an attorney could not summarily be found in contempt at the conclusion of a trial in which he had participated without "reasonable notice of the specific charges and opportunity to be heard in his own behalf." *Id.* at 499. While these decisions surely kept the right to defend alive while the Court was experimenting with the incorporation doctrine elsewhere, the decisions did little to contribute to the analytical framework of the right to present a defense. Since any defense had been completely precluded in these cases, "there is no occasion to define or delineate precisely what process is due." 404 U.S. at 502.

³³³*Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972); *Cool v. United States*, 409 U.S. 100 (1972).

³³⁴The long line of summary contempt cases had anchored that right to a solid foundation.

Although a few lower federal courts had previously suggested that evidentiary or procedural rulings which partially impaired the accused's ability to defend might violate constitutional principles,³³⁵ the more common assumption was that such rulings raised only issues of evidentiary or procedural law. Constitutional requirements were rarely discussed in such cases.³³⁶ Prior to 1972, there was little to suggest that trial judges' decisions on evidentiary or procedural matters adversely affecting the accused's case raised any constitutional issues. The pre-1972 Supreme Court case law strongly suggested that, unless the adverse ruling could be "pigeon-holed" into one of the categories of rights traditionally protected by the fifth and six amendments, no federal constitutional restraints limited the discretion of a trial judge. Thus, the shift to a more generalized due process analysis in the Supreme Court's assessment of right to defend cases marked a major shift in the potential magnitude and importance of the right to present a defense.

This shift toward a reliance on an elastic due process analysis occurred in one short and seemingly unimportant per curiam opinion of the Court. In *Webb v. Texas*,³³⁷ the Court held, in a 7-2 decision, that a Texas trial judge's repeated admonition to the accused's sole witness to refrain from lying, coupled with threats of a perjury prosecution if the witness lied, effectively discouraged the witness from testifying for the defense and thereby denied the defendant due process of law in violation of the fourteenth amendment.

The analysis of the Court in *Webb* clearly reflects a major, yet not unexpected, departure from prior approaches to right to defend problems. In *Webb* the defense's sole witness was a man who had an extensive prior criminal record and who was then serving time in prison. Apparently the criminal record of this witness prompted the trial judge on his own initiative to advise the witness not to lie and to assure the witness, *inter alia*:

If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the

³³⁵See, e.g., *Clack v. Reid*, 441 F.2d 801, 804 (5th Cir. 1971); *MacKenna v. Ellis*, 280 F.2d 592, 604 (5th Cir. 1960), modified, 289 F.2d 928 (5th Cir.) (en banc), cert. denied, 368 U.S. 877 (1961).

³³⁶See, e.g., *United States v. Colonial Motor Inn, Inc.*, 440 F.2d 1227, 1228 (1st Cir. 1971); *Peterson v. United States*, 268 F.2d 87, 89 (10th Cir. 1959); *United States v. Bookie*, 229 F.2d 130, 133 (7th Cir. 1956).

³³⁷409 U.S. 95 (1972).

chances you're taking by getting on that witness stand under oath.³³⁸

After the defense counsel objected to these comments and pointed out that the prosecution's witnesses had not been so admonished, the trial judge responded quite directly, "Let him decline to testify."³³⁹ The witness apparently grasped the thrust of the judge's comments since he thereafter refused to testify on any issue, and the court excused him. Clearly, this case could easily have been decided under an incorporation doctrine analysis by reference to the denial of the sixth amendment right to compulsory process caused by the trial judge's comments. Not only was the defendant completely denied the testimony of this witness, as in *Washington v. Texas*,³⁴⁰ but since this witness was the sole defense witness, the denial of compulsory process here was even more devastating to the accused's defense than in the *Washington* case. While the Court relied extensively on *Washington* in deciding *Webb*, the Court did not rest its decision on the right to compulsory process. Rather, quoting the dicta in *Washington* which suggested that due process protected the right of the accused "to present his own witnesses to establish a defense",³⁴¹ the Court chose to rest its decision solely on the due process clause.

As if to underline the tentative nature of its shift away from the incorporation doctrine, the Court's decision in the companion case of *Cool v. United States*,³⁴² decided the same day as *Webb*, did not rely solely on the due process clause. In *Cool* the petitioner challenged the trial court's decision to give a lengthy form accomplice instruction,³⁴³ which appeared to have been drafted to

³³⁸*Id.* at 96.

³³⁹*Id.*

³⁴⁰388 U.S. 14 (1967).

³⁴¹409 U.S. at 98, quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967). Justices Blackmun and Rehnquist dissented in *Webb*. Their position, as articulated in Justice Blackmun's dissenting opinion revolved about the inappropriateness of summary disposition of the case due to some suggestions in the record which to them made the judge's admonition more understandable. Thus, they note that the record in the state court below suggested that the defense witness was being called as an alibi witness, despite the fact that the prosecution's case reflected that the accused had been caught red-handed on the premises of the burglary. *Id.* at 98-99.

³⁴²409 U.S. 100 (1972).

³⁴³*Id.* at 101-02. The instruction is not set forth in full in the Supreme Court's opinion, but was set forth in the Seventh Circuit's decision as follows:

INSTRUCTION NO. 18

An accomplice is one who, with criminal intent, acts with others and participates in the commission of a crime. An accomplice is competent as a witness in a criminal case.

It is a general principle that in considering the credibility of an accomplice that his testimony is open to suspicion for it may be

deal with a situation in which the accomplice testifies for the prosecution. Thus, the instruction advised that while testimony of an accomplice is competent evidence, the jurors must assess its credibility and should treat such testimony like that of other witnesses only if "you are convinced it is true *beyond a reasonable doubt.*"³⁴⁴ Mrs. Cool, the petitioner, had been prosecuted for possessing and concealing counterfeit United States currency with intent to defraud. She had been arrested with her husband and one Robert Voyles after Voyles had passed two counterfeit bills. Voyles and the Cools had apparently travelled together from St. Louis, Missouri, to Brazil, Indiana, where they were arrested. The prosecution's case indicated that Mrs. Cool was seen throwing the bag containing counterfeit bills from her car after the arrest. Mrs. Cool had called Voyles as one of her defense witnesses.

actuated by self-interest, hostility, bias, hope of reward or other motivation, and his testimony should be carefully weighed and tested before giving it unlimited credence. As a general principle it is not safe to accept an accomplice's testimony unless it is corroborated by testimony of other persons or facts and circumstances clearly tending to prove it. His credibility must be determined by you as you will test the credibility of all witnesses as explained in these instructions.

However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source.

I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond reasonable doubt the essential elements of the charges in the Indictment against the defendants.

In determining whether or not the testimony of an accomplice has been corroborated, you will examine all of the evidence to ascertain pursuant to these instructions whether or not there is evidence tending to connect the defendants on trial with the alleged crime from evidence elicited from other sources than the testimony of the accomplice. You will look to the other testimony, and circumstantial evidence. Corroboration does not mean that every detail of the accomplice's testimony be testified to by another witness. Corroboration sought is of such material facts of the accomplice's testimony that would lend or detract from the credence of his testimony of such facts essential to the crime charged. Corroboration may be by direct or positive testimony or it may be by inferences or deductions drawn from established facts in evidence that in your opinion are warranted or justified or merited. The Court cannot say to you what is corroborated, that is for you to ascertain and determine from all the evidence beyond a reasonable doubt.

United States v. Cool, 461 F.2d 521, 524 n.1 (7th Cir. 1972).

³⁴⁴409 U.S. at 102 (emphasis in original).

Voyles, who had already pled guilty and been convicted, completely admitted his own guilt. However, he testified that neither the petitioner nor her husband had any involvement in the crime in question. Voyles testified that the Cools had simply given him a ride and knew nothing of the scheme in question. He further testified that he had concealed some counterfeit bills in a sack under the front bumper of the Cools' car near the headlights. The defense argued that it was this sack which the prosecution witness saw fall from the Cools' car as Mrs. Cool drove it. Thus, the crux of the accused's defense in *Cool* turned on the credibility of Voyles' testimony, and it was in this context that the questioned accomplice instruction was given.

On these facts, the *Cool* case would seem a less likely candidate for application of the sixth amendment compulsory process than *Webb*. In *Webb*, as in *Washington*, the defendant had in fact been prevented from introducing any part of the testimony of one of his witnesses because of the trial judge's rather pointed perjury admonitions which had frightened the defendant's only witness out of testifying. In *Cool* the defendant was not in any way prevented from introducing defense evidence. Voyles, the accomplice, was permitted to testify freely and fully; the complaint was, rather, that the court's accomplice instruction had improperly stigmatized and tainted this vital defense evidence. Thus, if the sixth amendment guarantee of compulsory process is designed to assure that the defendant can produce and present exculpatory evidence, it is difficult to see how that right is directly infringed on the facts of *Cool*.

Nevertheless, the Court's 6-3 decision³⁴⁵ held that the judge's instructions violated Mrs. Cool's sixth amendment compulsory process guarantee. The Court reasoned that since *Washington* had, under the rubric of the compulsory process guarantee, afforded Mrs. Cool the right to present the testimony of an alleged accomplice, the court's accomplice instruction violated that guarantee since it "impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable."³⁴⁶ In light of the fact that Voyles had testified and the jury had heard his testimony,³⁴⁷ the Court's reliance in *Cool* on the sixth amendment seems quite strained.³⁴⁸ Apparently, the Court was not al-

³⁴⁵Justice Rehnquist wrote a dissenting opinion joined in by Justice Blackmun and Chief Justice Burger. Their position seemed to be that the instruction, even if erroneous (which they doubted), did not affect the substantial rights of accused and certainly was not the type of error which should be sought out and analyzed on appellate review. *Id.* at 105-08.

³⁴⁶*Id.* at 104 (emphasis supplied).

³⁴⁷*Id.* at 101.

³⁴⁸See *Jackson v. Denno*, 378 U.S. 368 (1964), for an analogous situation

together comfortable with its decision, because it chose to ground its ruling alternatively on the view that the court's accomplice instruction, by creating an obstacle to the consideration of relevant defense evidence, effectively reduced the prosecution's burden of proof of guilt below the beyond a reasonable doubt standard required by the due process clause.³⁴⁹

The strange juxtaposition of the due process right to defend analysis adopted in *Webb* with the more strained sixth amendment approach of *Cool* is not easily explained. The per curiam opinions in the two cases may have been written by different Justices and the different approaches may reflect one Justice's greater awareness of the development of the right to defend and a willingness to ground such a right on the generalized and more elastic concepts of due process of law. Alternatively, the divergent approaches taken in *Webb* and *Cool* may reflect the hesitancy of Chief Justice Burger and Justice Powell, the newly appointed Justices who joined in the *Webb* opinion, to adopt a total incorporation approach to the fourteenth amendment's due process clause.³⁵⁰ By the latter view, since *Cool* came to the Court through a federal prosecution, the sixth amendment right to compulsory process was the correct rationale; however, since *Webb* was a state prosecution, the anti-incorporationists could argue that a fourteenth amendment due process analysis was the proper rationale for the case. Use of the anti-incorporationist view of these cases creates an irony, since that approach might afford greater constitutional protections to the accused in a state trial than in a federal one. If the right to present a defense in federal prosecutions must be grounded on an express guarantee in the Bill of Rights rather than on the due process clause of the fifth amendment, the right is inherently more circumscribed in federal prosecutions than in state trials. No express guarantee assures the accused's right to fully present evidence in his defense. As already discussed, some cases may be analyzed under the right to compulsory process, the right to counsel, the right to confrontation, or the privilege against self-incrimination. However, unless the case can be easily "pigeon-holed" under one of the express guarantees, no protection is afforded. Accordingly, the ability to rely on specific guarantees is to a great extent ephemeral. Of course, the Court has at times been willing to stretch and strain the language and purposes of some of those guarantees, but the elasticity of the specific guarantees of the fifth and sixth amendments pre-

which the Court resolved on due process grounds rather than upon a strained construction of the sixth amendment.

³⁴⁹409 U.S. at 104, relying on *In re Winship*, 397 U.S. 358 (1970).

³⁵⁰*Cf. Johnson v. Louisiana*, 406 U.S. 356, 375-80 (1972) (Powell, J., concurring).

sumably has some limits. On the other hand, when the right to defend is predicated on the open-ended, flexible contours of the due process clause of either the fifth or fourteenth amendment, the inherent elasticity of the doctrine's cornerstone permits ready analysis of all cases. In light of the reasons for the traditional objections to the incorporation doctrine, it would surely be a strange result which afforded *more* constitutional protection in state criminal proceedings than in federal prosecutions. Thus, it would be surprising if the divergent rationales in *Webb* and *Cool* rested on a disagreement about the direct application of the fifth and sixth amendments to the states.

The Court's movement toward adoption of a right to defend analysis culminated with *Chambers v. Mississippi*,³⁵¹ the second case grounded on due process principles rather than the incorporation doctrine. *Chambers* could easily have been the case in which the Court finally clearly embraced a right to present a defense analysis and delineated its implications. However, Justice Powell's opinion for the Court only half fulfills this function. Although espousing right to defend principles, Justice Powell's opinion took a hesitant and uncertain approach, yielding a result pregnant with potential but deficient in doctrinal analysis.

Chambers arose from a bizarre, yet compelling, set of facts. Leon Chambers was tried and convicted for murdering a police officer, Liberty, during an incident in which a group of twenty or more men had tried to prevent an arrest. After Liberty was shot, but before he died, he raised his gun and fired several times as the mob scattered. Witnesses said that with his second shot, the dying officer seemed to take deliberate aim at Chambers. After the police discovered that Chambers had survived the wounds inflicted by Liberty,³⁵² they charged him with murder, primarily on the strength of a purported dying declaration—Liberty's deliberate shooting of Chambers. One of the three police officers who saw the incident claimed that he saw Chambers shoot Liberty, but one defense witness testified that he was looking at Chambers when the shooting began and that Chambers had not fired any shots. No murder weapon was ever recovered; and, while the evidence showed that the dead police officer had been shot with a .22-caliber pistol, no evidence reflected that Chambers ever owned or possessed such a gun. The state's case against Chambers therefore was weak and rested primarily on the strength of one officer's

³⁵¹410 U.S. 284 (1973).

³⁵²Apparently the police never bothered to check on whether Chambers was dead or alive after the dying police officer shot him. They simply left him in the alley where he had fallen, and three of his friends discovered that he was still alive and transported him to a hospital, where he was subsequently arrested. *Id.* at 286-87, 289.

contradicted testimony and on the fact that Chambers had apparently been deliberately shot by the dying police officer.

In the United States Supreme Court, Chambers objected to the exclusion of half of his defense on evidentiary grounds. As noted above, Chambers had first tried to prove that a witness had observed him during the shooting and had not seen him fire any weapon. Chambers' defense counsel, however, attempted to go even further, and, in one of those rare Perry Mason-like displays of investigatory prowess, attempted to prove that another man named McDonald had shot Liberty. McDonald was one of the three persons who had taken Chambers to the hospital the night of the shooting and had been in the crowd that night. In fact, it required little in the way of investigatorial flair to focus attention on McDonald since he had, prior to Chambers' trial, confessed to others that he had committed the murder.

Shortly after the shooting, McDonald had left Woodville, Mississippi, the scene of the crime, and moved out of state. Later McDonald was lured back to Mississippi by an acquaintance, Reverend Stokes. When McDonald returned to Woodville, he went to see Stokes, and Stokes convinced McDonald to make a statement to Chambers' attorneys. Two days later McDonald gave Chambers' attorneys a sworn, signed, written confession that he had shot Liberty with his own nine-shot .22-caliber revolver which he discarded shortly after the murder. The confession also indicated that McDonald had previously told Joe Williams³⁵³ that he had shot the police officer.

Chambers' attorneys turned McDonald over to police authorities after he signed the confession. A month later at his preliminary hearing, McDonald repudiated his prior sworn confession and testified that Stokes had persuaded him to confess by promising him that he would not go to jail for the crime and that he would share in the proceeds of a false arrest suit Chambers would thereafter bring against the town. McDonald further testified that he had not been in the crowd when the policeman was shot, but had been down the street drinking beer with Berkley Turner, another one of the three men who had taken Chambers to the hospital. Although McDonald admitted that he had owned a .22-caliber pistol, he claimed that he had lost it many months before the shooting. The justice of the peace accepted McDonald's repudiation of his confession without securing any corroboration of his testimony from Stokes or Turner. Accordingly, McDonald

³⁵³*Id.* at 287. Williams, one of the members of the trio who had taken Chambers to the hospital, was also charged as a codefendant with Chambers. After the prosecution introduced no evidence implicating Williams, the trial court dismissed the charges against him. *Id.* at 287 & n.1.

was released and the authorities shifted back to their prosecution of Chambers.

In their effort to defend Chambers at trial, Chambers' attorneys sought to point the finger of guilt at McDonald. In that quest they encountered a series of evidentiary rulings which, while proper as a matter of state evidentiary law,³⁵⁴ partially prevented Chambers from introducing evidence indicating McDonald's guilt. As the Court described the case, "In large measure, he [Chambers] was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence."³⁵⁵ Significantly, despite the Mississippi rule of evidence excluding as hearsay declarations against penal interest,³⁵⁶ Chambers was permitted to introduce McDonald's signed and sworn confession before the jury after laying a foundation by examining McDonald. The state was also allowed on cross-examination of McDonald to prove that McDonald had repudiated his confession. Thus, the jury was advised of McDonald's confession and its subsequent repudiation. However, when defense counsel tried to go further in proving McDonald's guilt, they ran up against the wall of Mississippi's evidence law. First, defense counsel sought to question McDonald as an adverse witness in order to challenge his repudiation of the confession. Such a ruling would, of course, have taken McDonald's testimony out of the traditional "voucher" rule, which binds the party calling a witness by that witness' testimony,³⁵⁷ and have allowed Chambers' attorneys to impeach McDonald's testimony. However, the trial court ruled that while McDonald might be hostile, he was not adverse as a matter of law since he had not made any accusations against Chambers and therefore the court would not allow McDonald to be impeached by Chambers' attorneys.

After being thwarted in this attempt to undermine McDonald's repudiation of his confession, Chambers' attorneys sought to introduce testimony of three of McDonald's friends, including Turner, to whom McDonald had on separate occasions confessed that he shot the police officer. This evidence was excluded, apparently

³⁵⁴*Id.* at 289-90. The Mississippi Supreme Court reviewed the evidentiary rulings and merely held, over one dissent, that the trial judge had given Chambers' counsel even more leeway than evidentiary rules should have permitted. *Chambers v. State*, 252 So. 2d 217, 220 (Miss. 1971).

³⁵⁵410 U.S. at 289.

³⁵⁶*Brown v. State*, 99 Miss. 719, 55 So. 961 (1911).

³⁵⁷See generally *Clark v. Lansford*, 191 So. 2d 123, 125 (Miss. 1966); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 38 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. In light of McDonald's prior repudiation of his confession, Chambers' attorneys were naturally reluctant to be bound by McDonald's testimony.

because it was considered hearsay.³⁵⁸ While neither the trial judge's ruling nor the Mississippi Supreme Court decision provides a very lucid analysis of the hearsay rule applied, it appears that Mississippi's refusal to include declarations against penal interest within its declarations against interest exception to the hearsay rule was dispositive. Defense counsel was permitted, however, to elicit from Turner the fact that Turner had not been drinking beer with McDonald when the shooting occurred as McDonald claimed in his repudiation of the confession.³⁵⁹

Thus, defense counsel was permitted to introduce evidence of at least one of McDonald's prior confessions and was further permitted through Turner's testimony to partially undermine McDonald's repudiation of that confession. With the case in this posture, the Supreme Court held, in an 8-1 decision, that the exclusion of McDonald's other confessions to his friends and the trial court's concomitant refusal to permit Chambers' counsel to impeach McDonald deprived Chambers of due process of law in violation of the fourteenth amendment.³⁶⁰

³⁵⁸410 U.S. at 293. The record is unclear as to the reasons for the exclusion of certain of McDonald's prior confessions to friends. *Id.* at 293 n.6. The Mississippi Supreme Court, however, treated the exclusion as proper on hearsay grounds, apparently because Mississippi, like many states, did not recognize declarations against *penal* interest as an exception to the hearsay rule. *Chambers v. State*, 252 So. 2d 217, 220 (Miss. 1971). See generally *Brown v. State*, 99 Miss. 719, 55 So. 961 (1911); *MCCORMICK*, *supra* note 357, § 278, at 673; 5 *WIGMORE*, *supra* note 23, § 1476. Interestingly, on this view of Mississippi evidence law, the trial court's decision to allow McDonald's signed written confession into evidence was also erroneous as a matter of state evidentiary law.

³⁵⁹410 U.S. at 292. The only other evidence which Chambers presented which pointed the finger of guilt at McDonald was the testimony of a gun dealer from a neighboring community whose business records reflected that McDonald had purchased a nine-shot .22-caliber revolver about a year before the shooting and then purchased a different style pistol of the same caliber three weeks after the murder. *Id.* at 243 n.5.

³⁶⁰Significantly, while Chambers raised his constitutional objections at trial and on appeal, they were ignored by the courts at both levels. *Id.* at 290 n.3; *Chambers v. State*, 252 So. 2d 217 (Miss. 1971). This feature of the history of the *Chambers* case reflects the fact that, even after the criminal procedure revolution which the Warren Court sparked during the 1960's, courts and lawyers still tend to treat evidentiary and procedural rulings excluding defense evidence only at the level of evidentiary or procedural law. Except for the United States Supreme Court's few *sui generis* opinions discussed in this Article, the constitutional implications of the exclusion of defense evidence is almost never explored. That superficiality of analysis is, of course, in great part a result of the Court's failure or refusal to analyze right to defend cases on any coherent doctrine. The Court, in relying upon the specific guarantees of the fifth and sixth amendments or on an undefined due process analysis, has encouraged lower federal and state courts to ignore the constitutional implications in such evidentiary or procedural rulings. A clear, forthright recognition of the right to present a defense would, of course,

Unfortunately, Mr. Justice Powell's opinion for the Court provided little guidance as to *why* the trial court's evidentiary rulings denied Chambers due process of law. Most of the opinion focused on the history and purposes of the evidentiary rules involved in the case.³⁶¹ In fact, Justice Powell's opinion created substantial confusion as to whether constitutional or evidentiary concepts were the basis of the Court's decision. While the opinion expressly relied on the due process clause of the fourteenth amendment and the sixth amendment confrontation guarantee, at some points Justice Powell seemed more concerned with protecting the evidentiary objectives of assuring reliability in the fact-finding process than with the constitutional objective of fairness to the accused. Although those two concepts commonly coincide, they did not intermesh well on the facts of *Chambers*, and Justice Powell's opinion did not disentangle them.

The *Chambers* opinion begins and ends with the most glowing endorsement of the accused's right to present a defense yet found in the Court's criminal procedure cases. The Court's analysis, relying on several of the prior cases discussed in this Article,³⁶² begins by stressing the right to defend.

encourage the lower courts to consider and rule on the constitutional implications of their evidentiary and procedural rulings.

³⁶¹410 U.S. at 295-302. At points Justice Powell's opinion looks more like a discourse on evidence than a constitutional law decision. He noted, for example, that the "voucher" rule was a remnant of the early English trial by compurgators. He correctly stated that since the compurgators' oaths were strictly partisan, it was reasonable to assume that the party calling the compurgator vouched for his credibility, and that procedure bore little relationship to the modern fact-finding processes of the criminal trial. *Id.* at 296. Justice Powell's treatment of the rule of evidence which excludes as hearsay declarations against penal interest confuses the distinction between evidentiary law and constitutional law. Starting from the premise that exclusion of such evidence was designed to prevent perjured or untrustworthy evidence from entering the criminal trial process, Justice Powell argued that the evidence which was excluded contained significant indicia of accuracy and trustworthiness. Thus, he pointed out that McDonald had confessed spontaneously and separately to three different friends shortly after the murder. McDonald's confession was thus corroborated by the sheer number of times it was given and by the proof of his prior ownership of a .22-caliber weapon coupled with his subsequent purchase of a new weapon of similar type. Justice Powell also noted that the declaration was clearly self-incriminatory and against his penal interest in a context in which he stood to gain nothing by confessing. Finally, Justice Powell stressed that McDonald was present in the courtroom and was therefore subject to cross-examination by the state about the accuracy of these confessions. *Id.* at 299-301. Thus, Justice Powell's opinion seems to suggest that, as a matter of evidentiary law, the rule excluding declarations against penal interest should not have applied to the *Chambers* case.

³⁶²See *Jenkins v. McKeithen*, 395 U.S. 411 (1969), discussed at notes 292-300 *supra* and accompanying text; *Specht v. Patterson*, 386 U.S. 605

The right of an accused in a criminal trial to due process is, in essence, the *right to a fair opportunity to defend against the State's accusations*. The rights to confront and cross-examine witnesses and to *call witnesses in one's own behalf* have long been recognized as essential to due process.³⁶³

While the rights to confront and cross-examine witnesses are surely protected by the *express* provisions of the sixth amendment, the "right to a fair opportunity to defend" and the right "to call witnesses in one's own behalf" are not, unless they are always considered sheltered under the expanding umbrella of the compulsory process clause of the sixth amendment.³⁶⁴ Accordingly, Justice Powell chose the due process clause of the fourteenth amendment, rather than any incorporation theory, as the basis for the right to defend.

After noting that *Chambers* was a right to defend case, Justice Powell's opinion immediately launched into an evidentiary rather than a constitutional analysis. Finding the traditional "voucher" rule to have "little present relationship to the realities of the criminal process,"³⁶⁵ the Court held that the state trial court denied Chambers the right to confrontation of witnesses, in violation of the sixth and fourteenth amendments, when it prevented Chambers' counsel from cross-examining McDonald. While Justice Powell's opinion cites a few confrontation cases,³⁶⁶ it contains little discussion of this rather significant expansion of the confrontation clause to encompass cross-examination of the defendant's *own* witnesses, even if adverse in interest. The confrontation clause of the sixth amendment is phrased in terms of the right of the accused to confront "witnesses *against him*." Yet, McDonald never accused Chambers of anything; his testimony was important only because he had confessed to the crime himself. Thus, insofar as the *Chambers* opinion purports to rely on the confrontation clause, the Court seems to have expanded the sixth amendment protection beyond its express language. Justice

(1967), discussed at notes 260-65 *supra* and accompanying text; *In re Oliver*, 333 U.S. 257 (1948), discussed at notes 193-96 *supra* and accompanying text.

³⁶³410 U.S. at 294 (emphasis added).

³⁶⁴But see Westen, *supra* note 114.

³⁶⁵410 U.S. at 296.

³⁶⁶*Id.* at 295, citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Berger v. California*, 393 U.S. 314, 315 (1969); *Bruton v. United States*, 391 U.S. 123, 135-37 (1968); *Pointer v. Texas*, 380 U.S. 400, 405 (1965); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

Powell's opinion does not discuss any of these problems.³⁶⁷ Rather, the opinion focuses on the evidentiary futility of the "voucher" rule and virtually ignores constitutional problems.³⁶⁸ Significantly, Justice Powell's discussion of the "voucher" rule problem concludes with the observation that: "The 'voucher' rule, as applied in this case plainly interfered with Chambers' right to defend against the State's charges."³⁶⁹ Thus, despite Justice Powell's partial reliance on a sixth amendment incorporation approach, the overriding theme of the *Chambers* opinion is the right to present a defense.

Justice Powell's discussion of the exclusion of McDonald's prior confessions to Harden, Turner, and Cates also focuses more

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It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers. The availability of the right to confront and cross-examine *those who give damaging testimony against the accused* has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality [the "voucher" rule] or by any narrow and unrealistic definition of the word "against."

410 U.S. at 297-98 (emphasis added). Justice Powell's response to this argument based on the language of the confrontation clause obviously poses a significant analytical problem in the context of the *Chambers* case. While it is quite true that McDonald's repudiation of his confession and his proffered alibi were seriously adverse to Chamber's efforts to accuse him of the murder, McDonald did not give any "damaging testimony against the accused," *id.* at 298, but only thwarted Chambers' efforts to point the finger of guilt in McDonald's direction. Thus, Justice Powell's explanation as to why the confrontation clause applied to this case fails to directly address the problem.

³⁶⁸Justice Powell extensively criticized the "voucher" rule, which prohibits the party calling a witness from cross-examining or impeaching that witness. 410 U.S. at 296-98. Noting that the rule is a holdover from trial by compurgation, Justice Powell argued that it has no place in the modern criminal trial since "defendants are rarely able to select their witnesses: they must take them where they find them." *Id.* at 296. Thus, he concluded that the "voucher" rule has no place in modern criminal trials. How or why these considerations raise constitutional, as opposed to evidentiary, concerns is unclear from his opinion. Indeed, if his attack on the "voucher" rule is not dicta, it might be read as holding that the accused always has the right under the confrontation clause to cross-examine or impeach *his own witnesses* when they give any adverse testimony. One doubts seriously, however, whether Justice Powell had such a sweeping holding in mind when he discussed the utility of the "voucher" rule. Indeed, it may be the potentially broad sweep of his comments on the "voucher" rule which led him to limit his holding as follows: "We need not decide, however, whether this error [the application of the "voucher" rule] alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses." *Id.* at 298.

³⁶⁹*Id.* at 298.

attention on evidentiary principles than on constitutional doctrine. Thus, he stressed the various indicia of reliability and trustworthiness for McDonald's prior confessions found in the evidence in *Chambers*. Much of the thrust of the opinion on this issue seems to be an attack on the evidentiary assumptions and policies underlying the declaration against penal interest rule rather than an analysis of a constitutional issue.³⁷⁰ Thus, reliability seemed to take precedence over fairness in Justice Powell's analysis of the issue. Yet, he rested his decision regarding the exclusion of McDonald's prior confession solely on a due process right to defend analysis. Thus, Justice Powell's opinion contains a ringing endorsement of the right to defend:

Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . The

³⁷⁰While noting that most states and the federal courts have generally excluded declarations against penal interest as hearsay, Justice Powell argued that the reasons for this exclusion had no conceivable application to the *Chambers* case. *Id.* at 299-301. He assumed that the rule is predicated on the evidentiary assumption that such declarations may be either false or may lead to the presentation of perjured testimony to the jury. *Id.* at 299-300. Despite the fact that this evidentiary rule generally requires exclusion irrespective of other indicia of reliability, Justice Powell seemingly attacked the rule by arguing that in this case the circumstances provided three separate indicia of the reliability of McDonald's confession: (1) the excluded confessions were made spontaneously to friends shortly after the murder; (2) the confessions were corroborated by other evidence in the case, including the other confessions, McDonald's prior ownership of a .22-caliber weapon, and his purchase of a similar weapon after the murder; and (3) the confessions were clearly self-incriminatory and against McDonald's interest and McDonald had nothing to gain from such disclosures. Finally, McDonald was present at trial and subject to cross-examination. *Id.* at 300-01. Justice Powell purported to distinguish the prior Mississippi declaration against penal interest case, *Brown v. State*, 99 Miss. 719, 55 So. 961 (1911), as well as *Donnelly v. United States*, 288 U.S. 243 (1913), which similarly required exclusion. 410 U.S. at 301 & n.21. Justice Powell's analysis of reliability would seem, however, more appropriate to an evidentiary analysis than a constitutional one. *Brown* and *Donnelly* were decided on evidentiary grounds, and there was, accordingly, no good reason to distinguish them if *Chambers* was being decided on due process grounds. Yet, Justice Powell's opinion appears to confuse and interweave these analytically separate issues; therefore, the holding is far from clear.

That Justice Powell's discussion of evidentiary reliability had some impact is evidenced by some lower court cases which, while not reflecting a uniform trend, have limited the application of *Chambers* to cases in which the declaration against penal interest or other hearsay evidence had some extrinsic indicia of reliability such as corroboration. See, e.g., *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974); *People v. Craven*, 54 Ill. 2d 419, 299 N.E.2d 1 (1973); *People v. Hanks*, 17 Ill. App. 3d 633, 307 N.E.2d 638 (1974); *Ragler v. State*, 18 Md. App. 671, 308 A.2d 401 (1973); *State v. Higginbotham*, 298 Minn. 1, 212 N.W.2d 881 (1973).

testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice.³⁷¹

Having taken a giant constitutional step in applying the right to defend to the *Chambers* case, Justice Powell concluded his opinion for the Court by retrenching:

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.³⁷²

While Justice Powell was clearly right insofar as he purported to suggest that the right to defend was not a new principle of constitutional law, he was clearly wrong insofar as he purported to suggest that *Chambers* did not break new constitutional ground on any front. First, *Chambers*, together with *Webb v. Texas*,³⁷³ rested on due process grounds, rather than on an incorporation of one of the specific guarantees of the fifth or sixth amendments. Second, *Chambers* applied the right to defend for the first time to a case involving only *partial* exclusion of the defense testimony³⁷⁴ and the partial exclusion of testimony of particular defense witnesses who were allowed to present some evidence regarding other matters (i.e. the partial exclusion of Berkley Turner's testimony and the refusal to permit the cross-examination and impeachment of McDonald).³⁷⁵ Finally, since McDonald's written and signed confession was submitted to the jury, *Chambers* represents the first case in which the right to defend has been applied to arguably cumulative, albeit critical, defense testi-

³⁷¹410 U.S. at 302 (citations omitted).

³⁷²*Id.* at 302-03.

³⁷³409 U.S. 95 (1972).

³⁷⁴Compare *Taylor v. Hayes*, 418 U.S. 488 (1974); *Webb v. Texas*, 409 U.S. 95 (1972); *Groppi v. Leslie*, 404 U.S. 496 (1972); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *In re Oliver*, 333 U.S. 257 (1948); *Cooke v. United States*, 267 U.S. 517 (1925).

³⁷⁵Compare *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Washington v. Texas*, 388 U.S. 14 (1967); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

mony. Thus, in *Chambers* the Court clearly did break new constitutional ground.³⁷⁶

While new constitutional ground was broken in *Chambers*, the structure destined to be built on this new foundation is not clear.³⁷⁷ Unfortunately, although the Court clearly relied on the right to defend, the *Chambers* opinion yields no blueprint as to how the doctrine is to be applied. However, despite the analytic vagueness of the *Chambers* opinion, its holding is certainly a ringing endorsement of the right to defend.³⁷⁸

Thus, the Supreme Court cases clearly hold that a right to present a defense is constitutionally protected. These cases further hold that such a guarantee somehow controls even partial exclusions of defense testimony or evidence. Accordingly, the right to defend has important implications for state evidentiary and procedural rulings. However, the Supreme Court cases say little more. The constitutional basis of the right to defend is unclear, since some cases have grounded the right on the compulsory process clause,³⁷⁹ the fifth and fourteenth amendment due process

³⁷⁶Justice Rehnquist seemingly recognized that *Chambers* was clearly not a mere application of older principles of law. His lone dissent protests the "further constitutionalization of the intricacies of the common law of evidence." 410 U.S. at 308. Justice Rehnquist rested his dissent, however, on the ground that the constitutional issue in question was not properly raised in the Mississippi courts. *Id.* at 308-14. Justice White wrote a concurring opinion, disagreeing with Justice Rehnquist's view that the constitutional issue was not properly raised for review. *Id.* at 303-08.

³⁷⁷See, e.g., TRIAL MANUAL 3 FOR THE DEFENSE OF CRIMINAL CASES § 410-A (Amer. College of Trial Lawyers & ALI-ABA Joint Comm. on Continuing Legal Educ. 1974).

³⁷⁸Since *Chambers'* trial was found constitutionally deficient despite the fact that one of McDonald's prior confessions was submitted to the jury and *Chambers* was partially allowed to attack its repudiation, the *Chambers* holding may well have sweeping implications. While the Court suggested that the excluded testimony was "critical to Chambers' defense," 410 U.S. at 302, any potential distinction between "important" defense evidence and "critical" defense evidence is certainly not evident on the facts of the *Chambers* case.

Since *Chambers* the Supreme Court has had little opportunity to return to the right to defend analysis. Although a few subsequent cases have contained implications for the right to present a defense, the cases were on their facts easily decided under express guarantees of the fifth and sixth amendments, thereby obviating resort to a more generalized right to defend analysis. For example, in *Davis v. Alaska*, 415 U.S. 308 (1974), the Court held that the confrontation clause was violated when the State of Alaska refused on grounds of the traditional secrecy of juvenile proceedings to permit the accused to cross-examine a juvenile prosecution witness about his prior juvenile record. While discrediting prosecution witnesses is obviously often an important part of presenting a defense, such problems are commonly and readily analyzed under the confrontation clause.

³⁷⁹See, e.g., *Cool v. United States*, 409 U.S. 100 (1972); *Washington v. Texas*, 388 U.S. 14 (1967).

clauses,³⁸⁰ the privilege against self-incrimination,³⁸¹ the right to counsel,³⁸² and the right to confront witnesses.³⁸³ The Supreme Court cases also leave undefined the analytic test for right to defend cases. Surely not all evidentiary and procedural rules or rulings which in any way impede the defense are unconstitutional, but the distinction between constitutional obstacles and unconstitutional obstructions is wholly unclear from the cases. Therefore, the remainder of this Article will attempt to provide an analytic structure for the right to present a defense and suggest certain areas in the criminal trial for which the right has important implications.

V. BEYOND CHAMBERS: IN SEARCH OF A STANDARD OF REVIEW

A. *In Search of a Constitutional Source*

While the Court has analyzed right to defend cases under the fifth, sixth and fourteenth amendments,³⁸⁴ the bedrock for the constitutionally protected right to present a defense would seem to lie in the spirit and history of the Bill of Rights itself. As discussed above, the protections afforded the criminally accused in the Bill of Rights were designed to remove most or all of the obstacles which existed in 1791 to the presentation of the accused's defense.³⁸⁵ Each of the specific guarantees of the sixth amendment were, thus, designed to cure certain specific obstacles previously imposed on the accused by common law procedure. Therefore, grounding a general right to defend on any of the specific guarantees of the fifth or sixth amendments imposes a significant strain on the language and history of each of those guarantees. Accordingly, the right to present a defense should not, as some commentators have recently suggested, be grounded solely on the sixth amendment's right to compulsory process.³⁸⁶ Since the

³⁸⁰See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972); *In re Oliver* 333 U.S. 257 (1948).

³⁸¹See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972).

³⁸²See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Gibbs v. Burke*, 337 U.S. 773 (1949).

³⁸³See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

³⁸⁴See notes 379-83 *supra* and accompanying text.

³⁸⁵See, generally *Westen, supra* note 114.

³⁸⁶See *id.* at 127-31. Professor Westen's article on the compulsory process clause, while providing an excellent survey of right-to-defend cases and their history, attempts to analyze them as sixth amendment cases. The weakness in his analyses appears to be his willingness, not without sympathetic support from the Supreme Court, to bend the language and history of the sixth amendment beyond its intended purpose. As noted in sections I and II of this Article, the sixth amendment compulsory process clause was specifically designed to remedy the common law inability of the accused to subpoena his witnesses

specific guarantees of the fifth and sixth amendments are designed to resolve specific problems of criminal procedure, it would seem more sensible to ground the right to defend, especially insofar as the right must address new obstacles to the accused not envisioned by the Framers, on concepts more general and flexible than the narrow and specific guarantees of the fifth and sixth amendments.

Two equally acceptable and constitutionally adequate cornerstones for the right to defend should be evident from the foregoing discussion. First, the history of the development of criminal procedure and of the Bill of Rights certainly supports an argument that the overall spirit and intent of the fifth and sixth amendments, when read as a whole, protect a right to defend. Insofar as the fifth and sixth amendments were drafted to cure all or most of the then extant obstacles to presenting a defense, any organic reading of the Constitution as a growing and evolving document³⁸⁷ should require that the spirit of these amendments also protect the accused against new obstacles created after the amendments were drafted. Under this view, the right to defend would be protected as a "penumbra"³⁸⁸ of the fifth and sixth amendments. Second, for those less inclined toward a penumbral view of the Bill of Rights, the broad and flexible building-blocks of the due process clauses of the fifth and fourteenth amendments may provide the requisite foundation. Indeed, *Webb v. Texas*³⁸⁹ and *Chambers v. Mississippi*³⁹⁰ have already adopted this due process approach to the problem.

While the penumbral approach would seem supported by historical analysis, it is more probable that the present majority of the Supreme Court, insofar as it desires to continue protecting

which had the effect of leaving the accused without a defense if the defense witness refused to come to court. Indeed, Westen notes that Madison, in drafting the sixth amendment compulsory process clause, rejected Virginia Recommendation No. 8 for the text of the sixth amendment. *Id.* at 97 & n.113. (Virginia Recommendation No. 8 is set forth in full in 2 SCHWARTZ, *supra* note 53, at 841, and is, as Westen notes, patterned after the Virginia Declaration of Rights). Similarly, the sparse legislative history of the sixth amendment indicates that the compulsory process clause was only intended to secure the right to subpoena—not a more general right to present exculpatory testimony. See section II *supra*. Thus, to argue as Westen does, that the sixth amendment's compulsory process clause should function as a right to defend ignores this history and the purpose of the guarantee.

³⁸⁷Justice Holmes' opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), is a good example of organic reading of the Constitution. See *id.* at 433-34.

³⁸⁸See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1956) ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

³⁸⁹409 U.S. 95 (1972).

³⁹⁰410 U.S. 284 (1973).

the right to defend, will turn toward the due process clause.³⁹¹ Increasingly, the Burger Court majority has abandoned sole reliance on the incorporationist approach to the fourteenth amendment in favor of a due process clause analysis. At least Justice Powell has already indicated that he is disenchanted with analyzing state criminal procedure cases solely from an incorporationist perspective.³⁹² Moreover, some recent decisions indicate that the Burger Court may resurrect a "fundamental fairness" analysis of the fourteenth amendment due process clause. In *Chaffin v. Stynchcombe*,³⁹³ Justice Powell, writing for the Court, said that the clause protects "fundamental notions of fairness."³⁹⁴ And, in *Peters v. Kiff*,³⁹⁵ the Court, in holding that white defendants have a due process right to be tried by a jury free of racial discrimination, quoted prior cases and said, "A fair trial in a fair tribunal is a basic requirement of due process."³⁹⁶ Although it is unlikely that the Court will totally reject the incorporation doctrine in the near future, it does appear that the Court is moving away from that doctrine as the *sole* or *primary* analytic approach for defining the scope of the due process clause of the fourteenth amendment.³⁹⁷ Increasingly, the Court might be expected to rely on the elastic concepts of the due process clause, and the resurrection of the due process clause as an independent mode of analysis of problems of criminal procedure may result in a further delineation and expansion of the right to present a defense.

B. In Search of a Constitutional Test

While the Supreme Court's prior right to defend cases provide some suggestions regarding the source of this constitutional right, the cases almost totally fail to provide any rationale or consistent test to be applied in such cases. Although it might be suggested that the right to defend cases discussed in the prior section are the Court's idiosyncratic reactions to manifest injustices,³⁹⁸ such a view neither comports well with the role of the Supreme Court nor accounts for the rather consistent pattern of protection of this right afforded by the Court since it decided *Ferguson v. Georgia*³⁹⁹

³⁹¹See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

³⁹²See *Johnson v. Louisiana*, 406 U.S. 356, 375-80 (1972) (Powell, J., concurring).

³⁹³412 U.S. 17 (1973).

³⁹⁴*Id.* at 25. See also *United States v. Marion*, 404 U.S. 307, 324 (1971).

³⁹⁵407 U.S. 493 (1972).

³⁹⁶*Id.* at 501, quoting *In re Murchison*, 349 U.S. 133, 136 (1955).

³⁹⁷See also *Ham v. South Carolina*, 409 U.S. 524 (1973).

³⁹⁸Cf. J. WILKINSON, SERVING JUSTICE 23-27 (1974).

³⁹⁹365 U.S. 570 (1961).

in 1961. Presumably the United States Supreme Court does not and should not sit simply as a court of error. Rather, it is axiomatic that the Court takes constitutional cases to review important issues of constitutional doctrine.⁴⁰⁰ Given the fact that the Court has repeatedly taken and reviewed cases raising right to defend issues, it appears that the Court has viewed these cases as raising important issues of constitutional doctrine. Unfortunately, despite the Court's efforts over the last decade and a half, the contours of that doctrine remain enigmatic.

The Court's failure to develop an analytic test in this area stems from a failure or unwillingness to recognize the way in which constitutional issues of fairness to the accused become involved in almost *all* evidentiary and procedural rules and rulings. Perhaps fearing the very real floodgate potential of such a recognition, the Court's policy seems to have been to limit many of its right to defend rulings to the narrowest possible construction. Thus, after stating broad right to defend and compulsory process principles in *Washington v. Texas*,⁴⁰¹ the Court sought to limit the implications of its holding by suggesting that it did not apply to traditional testimonial privileges or state rules of evidentiary incompetency due to infirmity or incapacity.⁴⁰² Similarly, in *Chambers v. Mississippi*,⁴⁰³ the Court, in a rather incredible statement, said that in reaching its judgment it established no new principles of constitutional law.⁴⁰⁴ These efforts at judicial self-limitation, while understandable in view of the possible repercussions of the Court's decisions, are unpersuasive. In reality, a common thread binds together such seemingly disparate cases as *Washington*, *Ferguson v. Georgia*,⁴⁰⁵ *Brooks v. Tennessee*,⁴⁰⁶ and *Chambers*. That thread is the right to present a defense. The fact that the Court has reviewed these cases and found a constitutional deprivation in each one supports the view that evidentiary or procedural rules and rulings affecting the presentation of the defense case are of a constitutional dimension. However, the right to defend cases decided by the Supreme Court all arose from the most outrageous violations of this guarantee.

Evidentiary rules tend to focus attention on issues of evidentiary reliability, and procedural rules tend to focus on issues of judicial economy, regularization, and even procedural reci-

⁴⁰⁰Cf. U.S. SUP. CT. R. 19. See also *Donnelly v. DeCristoforo*, 416 U.S. 637, 648 (1974) (Stewart, J., concurring); *id* at 651-652 (Douglas, J., dissenting).

⁴⁰¹388 U.S. 14 (1967).

⁴⁰²*Id.* at 23 n.21.

⁴⁰³410 U.S. 284 (1973).

⁴⁰⁴*Id.* at 302.

⁴⁰⁵365 U.S. 570 (1961).

⁴⁰⁶406 U.S. 605 (1972).

procity. The constitutional dimension to the right to present a defense is designed to focus judicial attention on the *fairness* of the rule or ruling to the accused. Unfortunately, analyzing problems solely at an evidentiary or procedural level commonly causes courts to lose sight of the rather valuable perspective of fairness gleaned from considering the right to defend as a separate issue. Thus, the right to defend issues lurking in any procedural or evidentiary ruling adversely affecting the accused's ability to present a defense are easily ignored by courts focusing on evidentiary or procedural rules.

Although recognition of the right to present a defense has far-reaching implications, it need not create a flood of litigation or cause a revolutionary change in criminal procedure. The flood of cases would be better dammed by clearly embracing the right to defend and announcing a clear test for its application than by deciding each case on seemingly *sui generis* principles or by seeking through unconvincing disclaimers to limit the impact of a decision. The latter approach, insofar as it fails to yield any guiding principles, seemingly *encourages* appeals seeking a *sui generis* ruling. Thus, the present lack of an analytic framework for the right to defend results in an uncertainty, and possibly a skepticism, about the right.⁴⁰⁷ The effect of this uncertainty on the lower courts results in a requirement that all such cases be finally resolved only by the Supreme Court. Thus, a forthright demarcation of the right to present a defense would also have the advantage of removing most of this burden from the Supreme Court and placing it in the state and lower federal courts where it primarily belongs.

Like many other constitutional rights, the guarantees of fairness implicit in the right to defend must be accommodated with other governmental interests, many of which find expression in the procedural or evidentiary rules which burden the accused's ability to defend. Therefore, the key to developing a coherent constitutional approach to the right to defend is the *balancing* of the constitutional values of fairness protected by the right to defend against the governmental interests expressed in the procedural or evidentiary rulings. The application of a balancing test would protect governmental interests in rules of evidence or procedure and would compel constitutional intervention only when the governmental interest does not outweigh the accused's right to present a complete defense. Thus, the accused clearly could not invoke the right to defend in order to prolong his trial by offering wholly repetitious, cumulative, or irrelevant evidence.⁴⁰⁸ On the other

⁴⁰⁷See, e.g., *Maness v. Wainwright*, 512 F.2d 88 (5th Cir. 1975); *People v. Duckett*, 56 Ill. 2d 432, 308 N.E.2d 590 (1974); *Ragler v. State*, 18 Md. App. 671, 308 A.2d 401 (1973); *State v. Romero*, 86 N.M. 674, 526 P.2d 816 (1974).

⁴⁰⁸Cf. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973). The accused, in a re-

hand, *Chambers v. Mississippi*⁴⁰⁹ makes it clear that a court could not use a mechanistic application of rules of evidence to preclude the introduction of important defense evidence.

The concept of balancing an accused's federal constitutional rights against a state's procedural interests is certainly not novel. In *Henry v. Mississippi*,⁴¹⁰ the Court adopted a similar balancing approach in deciding whether state procedural default barred review of federal constitutional issues relating to criminal procedure; and, as noted above, *Brooks v. Tennessee*⁴¹¹ also suggested a balancing approach for right to defend cases.⁴¹² Thus, it appears that some sort of balancing test can best accommodate the competing interests of constitutional fairness, on the one hand, and evidentiary reliability and procedural regularity, on the other hand. However, the concept of a balancing test merely begins the development of an analytic framework for the right to defend. A perspective for weighing the interests on either side of the scale is still required.

Since the Court has said that the right to defend and to fully present a defense is a *fundamental* right protected, *inter alia*, by the fourteenth amendment due process clause,⁴¹³ under traditional principles the most appropriate way to analyze the governmental interest in evidentiary or procedural rules would be the application of a compelling or legitimate interest test.⁴¹⁴ *Brooks* clearly adopts

trial for forcible robbery, had given pursuant to Georgia procedure an unsworn statement in which he gave "an emotional discussion of his family background, an account of his religious affiliation, job history, and previous physical injuries, and a rendition of several religious poems and songs he had written." *Id.* at 19. Apparently the jury either failed to appreciate his poetry or did not like his singing voice since they sentenced him to life imprisonment, a harsher result than the original sentence. The accused then sought a writ of habeas corpus on the ground that the higher sentence imposed at the second trial violated due process. *Id.* at 21. The Supreme Court held that the fourteenth amendment was not violated because the second sentence was not the product of vindictiveness. *Id.* at 23-28.

⁴⁰⁹410 U.S. 284 (1973).

⁴¹⁰379 U.S. 443, 447-49 (1965). Specifically, the Court said:

[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. *In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.*

Id. at 447-48 (emphasis added).

⁴¹¹406 U.S. 605 (1972).

⁴¹²See note 323 *supra* and accompanying text.

⁴¹³See *Washington v. Texas*, 388 U.S. 14 (1967).

⁴¹⁴See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Jackson*, 390 U.S. 570, 582-83 (1968); *Griffin v. Illinois*, 351 U.S. 12 (1956). See generally Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing*

such a standard,⁴¹⁵ and at least one commentator has suggested that the opinion in *Washington v. Texas*⁴¹⁶ implies such an approach.⁴¹⁷

The compelling or legitimate governmental interest analysis applicable to right to present a defense cases must differ in some respects from the compelling governmental interest test as it has sometimes been applied in other contexts. Clearly, the compelling interest analysis involves a balancing process. The interest protected by the accused's constitutional right must be weighed against the governmental interest advanced to infringe that right. Although the test would seem to require a weighing of the interests on both sides of the scale, cases applying the compelling interest test to situations other than the right to defend have commonly given a presumptive weight to the constitutional side of the equation and have evaluated only the governmental interest,⁴¹⁸ thereby obscuring the balancing process at work. By contrast, the analysis of any right to defend case necessarily requires a weighing of both sides of the scale. Although the compelling interest test might suggest that any obstruction of the accused's opportunity to present a defense bears a heavy burden of justification, the burden must be applied flexibly, depending on how significantly the obstruction imposed on the accused undercuts the ability to present a defense. Clearly, the exclusion of all defense witnesses is an obstruction of a wholly different magnitude than the exclusion of cumulative or irrelevant evidence. Thus, the weighing of the importance of the excluded evidence to the accused in the context of the defense is a vital element to the analysis of any right to defend case. Indeed, the necessity of making such an evaluation was implied in *Chambers* in which the Court stressed that the excluded confessions were "critical to Chambers' defense"⁴¹⁹ and in *Washington* in which the Court stressed that the excluded evidence was "vital to the defense."⁴²⁰

An evaluation of the importance of the excluded testimony to the accused can, of course, only be made by evaluating its role in the total context of both the accused's defense and the case as a

Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); Westen, *supra* note 114, at 116 n.201; Note, *Preclusion Sanction*, *supra* note 307, at 1353-61.

⁴¹⁵ See text accompanying note 412 *supra*.

⁴¹⁶ 388 U.S. 14 (1967).

⁴¹⁷ See Westen, *supra* note 114, at 115-16 & nn.200-01.

⁴¹⁸ See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 633-38 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). But see, *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 97-130 (1972) (Marshall, J., dissenting).

⁴¹⁹ 410 U.S. at 302 (emphasis added). See also *People v. Hanks*, 17 Ill. App. 3d 633, 307 N.E.2d 638 (1974) (part of *Chambers* test requires that evidence be critical to the defense and have a tendency to prove innocence).

⁴²⁰ 388 U.S. at 16 (emphasis added).

whole. Thus, this right to defend analysis almost necessarily compels the adoption of some type of "totality of the circumstances" approach which the Supreme Court has recently used so frequently.⁴²¹ The importance of the excluded evidence must be analyzed in light of its importance in the total defense picture and in light of the full facts of the case. However, adoption of a totality of the circumstances test in reviewing the importance of excluded defense evidence does not necessarily mean, as one commentator has suggested, that the case must be decided by "lumping all of the facts together without identifying issues of particular importance or giving particular weight to the interests involved."⁴²² Rather, the totality of the circumstances test suggested here furthers an exploration of the interests involved by requiring an analysis of the importance of the excluded evidence to the accused in the context of the case under review. Thus, such a due process analysis will not obstruct the protection of the right to defend.⁴²³

Assuming that the defense is found to be significantly obstructed by evidentiary or procedural rulings, further inquiry must still be made to determine whether some compelling governmental interest *outweighs* the significant unfairness resulting from partially denying the accused his day in court. As the name of the test suggests, such a compelling governmental interest would necessarily have to be of great magnitude. Presumably, as part of the analysis of the governmental interest advanced, some inquiry must be made as to whether the evidentiary or procedural objectives justifying the infringement of the accused's constitutional rights might not be furthered by means which less drastically undermine the accused's ability to present a defense.⁴²⁴ To the extent that less drastic alternatives are available, the governmental interest infringing on the right to present a defense is less compelling.

From the foregoing it is obvious that a balancing or accommodation of governmental interests in reliability and judicial regular-

⁴²¹See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Neil v. Biggers*, 409 U.S. 188 (1972); *Barker v. Wingo*, 407 U.S. 514 (1972).

⁴²²Westen, *supra* note 114, at 130.

⁴²³Cf. *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973); *United States v. Torres*, 477 F.2d 922 (9th Cir. 1973); *Howard v. State*, 303 A.2d 653 (Del. 1973); *State v. Jamison*, 64 N.J. 363, 316 A.2d 439 (1974); *People v. Sweeney*, 43 App. Div. 2d 564, 349 N.Y.S.2d 63 (1973); *Commonwealth v. Jennings*, 225 Pa. Super. 489, 311 A.2d 720 (1973); *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973). All of the foregoing cases find violations of the *Webb-Chambers* rules despite the reliance in *Webb* and *Chambers* on elastic due process principles and totality of circumstances analyses. Compare Westen, *supra* note 114, at 130 n.288 (suggesting that the due process clause totality of circumstances test encourages decisions limited explicitly to their facts without precedential impact).

⁴²⁴Cf. *United States v. Jackson*, 390 U.S. 570 (1968); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

ization with the constitutional interests in fairness to the accused protected by the right to defend must be made in each case. Per se rules of previous cases decided under the guise of the specific guarantees of the fifth and sixth amendments simply will not facilitate such an accommodation.⁴²⁵ Rather, this accommodation should be made by using an elastic due process analysis of the type advanced here. By requiring a compelling state interest to outweigh the accused's constitutional interest in fairness, the right to present a defense is given appropriate protection. Moreover, by engaging in a case-by-case balancing, the accommodation of these sometimes competing interests can be facilitated. Of course, such an analysis of criminal evidentiary and procedural problems has important ramifications for various criminal trial practices and some of these implications are explored in the next section. Before turning to such prognostication, however, a brief analysis should be made of two other constitutional doctrines which affect the analysis of right to defend cases—waiver and harmless error.

C. Waiver and Harmless Error

The waiver doctrine has a limited, but important, application to the right to present a defense. In situations in which evidence is excluded on evidentiary grounds, it is hard to imagine how the waiver doctrines might apply. Since the accused has chosen to offer the excluded evidence, it is difficult to argue waiver unless the exclusion was based on a failure to preserve the issue for review by making an offer of proof.⁴²⁶ In areas of procedural default, however, the waiver doctrines have very real applications which will be discussed in the next section. If defense evidence is excluded because of procedural default,⁴²⁷ the default should be equivalent to a waiver of federal constitutional rights if the exclusion of vital defense evidence is to be upheld.

The argument that an accused's procedural default alone constitutes a waiver of federal constitutional right conflicts significantly with the constitutional waiver doctrines. The applicable standard required for any waiver of federal constitutional rights affecting the fairness of a criminal trial⁴²⁸ is "an intentional relin-

⁴²⁵Contra Westen, *supra* note 114.

⁴²⁶Cf. MCCORMICK, *supra* note 367, § 51. The making of some type of offer of proof is very important to preserving any right-to-defend issue. Without some explanation of the content of excluded testimony, it is virtually impossible for a reviewing court to engage in the kind of balancing needed to resolve a right-to-defend case. Cf. Holman v. Lawhon, 362 F.2d 1 (5th Cir. 1966) (writ of habeas corpus denied in compulsory process case due to failure to demonstrate the nature of excluded testimony).

⁴²⁷See, e.g., FED. R. CRIM. P. 12.1; KAN. STAT. ANN. § 22-3218(4) (1973).

⁴²⁸See generally Schneckloth v. Bustamonte, 412 U.S. 218, 238-46 (1973). Since the right to present a defense is integrally tied to the fairness and reli-

quishment or abandonment of a known right or privilege."⁴²⁹ The Supreme Court has repeatedly held that the showing of an intention to waive must be clearly manifested in the record. Thus, waivers of federal constitutional rights will not be presumed by inaction or on a silent record.⁴³⁰ Procedural rules which result in exclusion

bility of the trial process, a strict waiver standard must be applied in criminal trials under the *Schneckloth* analysis. *Id.* at 237, 241-42.

⁴²⁹Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

⁴³⁰See, e.g., Barker v. Wingo, 407 U.S. 514, 526 (1972); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Carnley v. Cochran, 369 U.S. 506, 516 (1962). After this Article was written and in the printing stage, the United States Supreme Court decided the case of *Estelle v. Williams*, 96 S.Ct. 1691 (1976), which may seriously undercut the traditional federal waiver standard expressed in Johnson v. Zerbst, 304 U.S. 458 (1938). While the Court in *Estelle* held that a criminal defendant had a due process right not to be tried in jail clothing, the Court refused to reverse the petitioner's conviction because his trial counsel failed to raise any objection at trial to his client's prejudicial attire. The petitioner unsuccessfully argued that despite the lack of objection no knowing and intelligent waiver of the due process right appeared on the record. Chief Justice Burger's response to this argument seemed to limit the applicability of the traditional *Johnson* waiver standard considerably:

Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson v. Zerbst*, . . . where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney.

96 S. Ct. at 1697.

As Justice Brennan's dissent in *Estelle* notes, the majority opinion appears to depart from the traditional *Johnson* waiver standard "by promulgating the novel and dangerous doctrine that a basic due process safeguard, affecting the fairness and accuracy of the factfinding procedure, is a contingent right that does not even come into existence until it is affirmately asserted." *Id.* at 1701. Specifically, the Court's opinion in *Estelle* may signal, as Justice Brennan fears, an abandonment of several of the basic elements of the classic federal constitutional waiver standards. First, *Estelle* suggests that the waiver need not be personally made by the accused, but a choice made by counsel without the participation of the accused may be sufficient. Yet, in *Fay v. Noia*, 372 U.S. 391, 439 (1963) the Court had expressly rejected this approach. *But see Francis v. Henderson*, 96 S. Ct. 1708 (1976). Second, the opinion in *Estelle* suggests that the Court is willing to permit waiver to be found on a silent record despite cases to the contrary. Finally, *Estelle* also suggests that the corollary principle that the waiver of a federal constitutional right can never be presumed simply from inaction is now open to substantial question. Chief Justice Burger's opinion appears to suggest that the classic definition of waiver will only apply in the future to cases, like *Johnson*, involving the appointment of counsel. Once counsel is appointed a much less exacting standard may be applied and the accused

of important defense evidence simply because of procedural default by inaction are difficult to justify on a waiver theory under the Supreme Court's standards.⁴³¹

The harmless error doctrine also has a limited application to the right to present a defense analysis.⁴³² The considerations protected by the harmless error doctrine are already built into the balancing test utilized in determining whether the right to defend has been violated. In evaluating the importance to the accused of the excluded evidence for the purposes of the balancing analysis, the harmlessness of the exclusion must be judged. Thus, to engage in a harmless error analysis *in addition* to making a determination of whether the right to defend has been violated is to engage in redundant analysis, particularly since the applicable test for harmless error is whether the court can "declare a belief that it was harmless error beyond a reasonable doubt."⁴³³

VI. THE CRIMINAL TRIAL AND THE IMPACT OF THE RIGHT TO PRESENT A DEFENSE

Recognition of the right to defend as a federally protected constitutional guarantee obviously has significant ramifications for substantial segments of the criminal trial process, but the implications of the emergent right are only partially clear. However, the impact of the right to defend need not necessarily be disruptive to the criminal trial process. To a great extent, the traditional assumption of American jurisprudence that the accused is entitled to a full hearing at trial has prevented the emergence of many obstructions to the presentation of the defense case. State experience with the right to present a defense further suggests that recognition of such a guarantee does not pose a major disruptive threat to the modern criminal trial process. Many states presently have, or at one point in history had, state constitutional provisions intended or construed to guarantee the right to present a defense.⁴³⁴

may be much more substantially bound by counsel's unilateral decisions or inadvertent errors. Thus, the traditional federal waiver standards upon which some reliance has been placed in this Article are now open to substantial question. Accordingly, some rethinking of the author's analysis of the preclusion sanction may be necessary if Justice Brennan's dire prophecies about the meaning of *Estelle* are fulfilled in later cases. See notes 585-590 *infra* and accompanying text.

⁴³¹See generally Note, *Preclusion Sanction*, note 307 *supra*.

⁴³²Cf. *Chapman v. California*, 386 U.S. 18 (1967).

⁴³³*Id.* at 24.

⁴³⁴Sixteen states presently protect the right *to be heard*. ALA. CONST. art. I, § 6; ARK. CONST. art. 2, § 10; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; IND. CONST. art. 1, § 13; KY. CONST. § 11; ME. CONST. art. I, § 6; MISS. CONST. art. 3, § 26; OKLA. CONST. art. II, § 20;

While some of these states have interpreted such constitutional provisions to protect the right to defend, as that right has been explained in this Article,⁴³⁵ their decisions have not caused any radical changes in their criminal procedures. Rather, these states have generally reserved the use of constitutional provisions for cases of serious interference with an accused's opportunity to defend,⁴³⁶

ORE. CONST. art. I, § 11; PA. CONST. art. I, § 9; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; VT. CONST. ch. I, art. 10; WIS. CONST. art. I, § 7.

Three states, following the original language of the Massachusetts Declaration of Rights, protect the right "to be *fully heard* in his defence by himself, or his counsel, at his election," or some variant thereof. MASS. CONST. pt. I, art. XII (emphasis supplied); N.H. CONST. pt. I, art. 15; S.C. CONST. art. I, § 18.

Sixteen states protect the right to appear and *defend*. ARIZ. CONST. art. II, § 24; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 16; ILL. CONST. art. I, § 8; KAN. BILL OF RIGHTS § 10; MO. CONST. art. I, § 18(a); MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; NEV. CONST. art. I, § 8; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 10; UTAH CONST. art. I, § 12; WASH. CONST. art. I, § 22 & amend. X; Wyo. CONST. art. I, § 10. Louisiana's constitution at one time guaranteed the accused "the right to defend himself." LA. CONST. art. I, § 9 (1921). In 1974, the Louisiana constitution was amended to give the accused the right "to present a defense." LA. CONST. art. I, § 16 (1974).

Virginia guarantees the right of the accused to "call for evidence in his favor." VA. CONST. art. I, § 8. Two states guarantee the accused time to prepare for his defense. MD. DECLARATION OF RIGHTS art. 21; W. VA. CONST. art. III, § 14.

⁴³⁵See, e.g., Peagler v. State, 110 Ala. 11, 20 So. 363 (1896) (right of the accused to be heard guaranteed by ALA. CONST. art. I, § 6 not violated by limiting defense argument to 1½ hours); Merritt v. State, 59 Del. 289, 219 A.2d 258 (1966) (right to be heard guaranteed by DEL. CONST. art. I, § 7 violated by commencing trial within ½ hour after initial appointment of counsel); Deeb v. State, 131 Fla. 362, 179 So. 894 (1937) (right to be heard guaranteed by FLA. CONST. art. I, § 16 violated when accused is not allowed to testify fully to material and relevant facts); State v. Sheddoudy, 45 N.M. 516, 118 P.2d 280 (1941) (right to defend guaranteed by N.M. CONST. art. II, § 14 violated by trial court's refusal to allow defense counsel to argue an issue of fact upon which the jury must decide).

⁴³⁶Compare cases cited note 435 *supra*; Floyd v. State, 90 So.2d 105 (Fla. 1956) (right to be heard guaranteed by FLA. CONST. art. I, § 7 violated by entry of guilty plea without defense having rested); Bennett v. State, 127 Fla. 759, 173 So. 817 (1937) (right to be heard guaranteed by FLA. CONST. art. I, § 7 violated by jury instruction undermining defense witness' testimony); Shelton v. State, 102 Ohio St. 376, 131 N.E. 704 (1921) (right to defend guaranteed by OHIO CONST. art. I, § 10 violated by refusal to permit the accused to plead for mercy from jury); State v. Ballenger, 202 S.C. 155, 24 S.E.2d 175 (1943) (right to be fully heard guaranteed by S.C. CONST. art. I, § 18 violated by one hour limitation on defense argument); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (right to be fully heard guaranteed by S.C. CONST. art. I, § 18 violated by limiting number of alibi witnesses); Bobo v. Commonwealth, 187 Va. 774, 48 S.E.2d 213 (1948) (right to "call for evidence in his favor" guaranteed by VA. CONST. art. I, § 8 includes right to private pretrial interview with imprisoned defense witness); and Cremeans v. Com-

thereby preventing the constitutional guarantee from nullifying all rules of evidence or procedure.

Even though the right to present a defense may not have a disruptive impact on the criminal trial process, it certainly has a pervasive influence on the process since the right to defend provides a constitutional dimension to the analysis of evidentiary rulings and procedural rules. The remainder of this Article will explore the impact of the right to defend upon the criminal trial process and tentatively suggest ways in which the balancing analysis advanced in the prior section should be applied to resolve the issues posed.

It should be noted that the balancing analysis is provided to cover only those rights not expressly guaranteed by the fifth and sixth amendments. There is no need to resort to a due process right to defend analysis for clear violations of the specific guarantees of the Bill of Rights.⁴³⁷ Rather, the analysis posed herein is presented as an alternative means of solving right to defend problems which are not covered by the precise language of the fifth and sixth amendments.⁴³⁸

A. Evidentiary Exclusion and the Right to Defend

As the Supreme Court's decisions in *Chambers v. Mississippi*⁴³⁹ and *Washington v. Texas*⁴⁴⁰ amply demonstrate, evidentiary monwealth, 104 Va. 860, 52 S.E. 362 (1905) (right to "call for evidence in his favor" guaranteed by VA. CONST. art. I, § 8 violated by forcing accused to commence trial in the absence of a material defense witness), with *Crawford v. State*, 112 Ala. 1, 21 So. 214 (1896) (right to be heard guaranteed by ALA. CONST. art. I, § 6 not violated by time limitation on defense argument); *Watkins v. State*, 216 Tenn. 545, 393 S.W.2d 141 (1965) (right to be heard guaranteed by TENN. CONST. art. I, § 9 not violated by permitting jurors to use in deliberations notes taken by them during trial). See also *People v. Karlin*, 231 Cal. App. 2d 227, 41 Cal. Rptr. 786 (1964); *People v. Garcia*, 202 Cal. App. 2d 492, 20 Cal. Rptr. 856 (1962); *State v. MacKinnon*, 41 Nev. 182, 168 P. 380 (1917); *State v. Strauss*, 114 S.C. 445, 103 S.E. 769 (1920); *Leahy v. State*, 111 Tex. Crim. 570, 13 S.W.2d 874 (1928).

⁴³⁷Clearly, if the accused is prevented from presenting his defense because of limitations imposed on his right to cross-examine witnesses, the problem should be resolved under the sixth amendment confrontation clause rather than using the generalized right to defend analysis. See *Davis v. Alaska*, 415 U.S. 308 (1974). Similarly, if a court refuses to subpoena a defense witness, a compulsory process issue is clearly raised under the sixth amendment.

⁴³⁸Heretofore, during the 1960's the Supreme Court often seized upon these express guarantees, despite their seeming inapplicability, as the vehicle for resolving such cases. See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Cool v. United States*, 409 U.S. 100 (1972). However in recent years the Court has increasingly recognized that a more flexible due process analysis is appropriate for such cases. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972).

⁴³⁹410 U.S. 284 (1973).

⁴⁴⁰388 U.S. 14 (1967).

rules and their application in specific cases⁴⁴¹ can raise significant right to defend issues. While the recent trend in twentieth century American jurisprudence has leaned toward liberality in the reception of evidence,⁴⁴² specific problems continue to plague the accused. Three areas are of particular concern here and will, accordingly, be examined in light of the right to defend analysis advanced above. First, the rules of evidence, such as hearsay and relevancy, designed to assure reliability of the fact-finding process will be analyzed. Second, rules excluding certain types of scientific evidence, such as polygraph and similar evidence, will be discussed separately because of their importance to the criminal process, even though such rules are really sub-issues of the first category of evidentiary rules. Finally, rules of evidence which protect interests other than reliability, such as the testimonial privileges, will be analyzed.

1. Reliability, Relevancy, and the Right To Present a Defense—The vast bulk of Anglo-American evidentiary law is designed to assure the reliability of the fact-finding process. Thus, rules of evidence such as the hearsay rule and its exceptions,⁴⁴³ production of the original document rule,⁴⁴⁴ rules of authentication,⁴⁴⁵ and testimonial disqualifications of perjurors⁴⁴⁶ have been developed to assure that only reliable evidence is heard by the trier of fact. Similarly, the materiality and relevancy rules,⁴⁴⁷ by keeping the jury's attention focused on evidence related solely to the issues posed in the case, help assure the reliability of the fact-finding process. In addition to assuring reliability, the relevancy rules are also, as Justice Holmes noted, "a concession to the shortness of life."⁴⁴⁸ They assure that the trial will not be inordinately drawn out by the presentation of evidence of only limited probative value.

While these rules and the basic objectives they protect are generally salutary features in the criminal trial process, they

⁴⁴¹Of course, the application of rules of evidence regarding the scope of cross-examination raises similar questions for the accused. Those issues are, however, properly analyzed under the specific protections of the sixth amendment confrontation clause, rather than by utilizing a looser due process analysis. Cf. *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

⁴⁴²See, e.g., *Rosen v. United States*, 245 U.S. 467 (1918); FED. R. CIV. P. 43(a). See generally FED. R. EVID.

⁴⁴³See generally MCCORMICK, *supra* note 357, §§ 254-324.

⁴⁴⁴See generally *id.* §§ 229-43.

⁴⁴⁵See generally *id.* §§ 218-28.

⁴⁴⁶See, e.g., N.D. CENT. CODE § 31-01-08 (1960) (repealed 1973); OKLA. STAT. ANN. tit. 21, § 506 (Supp. 1975-76); S.D. COMP. LAWS. ANN. § 19-1-4 (1967); WASH. REV. CODE ANN. § 5.60.040 (1963).

⁴⁴⁷See generally MCCORMICK, *supra* note 357, §§ 184-211.

⁴⁴⁸*Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 943-44 (1887).

can, when applied mechanistically, significantly interfere with the ability of the accused to present a defense. *Chambers* and *Washington* are both examples of unconstitutional excesses resulting from the mechanical application of rules of evidence. In each of these cases, evidence was excluded on the basis of existing state rules ostensibly designed to protect the reliability of the fact-finding process. In both cases the rules were founded on the assumption that the excluded testimony, declarations against penal interest, and testimony of accomplices or coprincipals, posed a substantial likelihood of being perjured. Yet, in both *Chambers* and *Washington*, the Court held that the interests protected by the accused's right to defend outweighed the state's interest in assuring reliability.⁴⁴⁹ Significantly, neither *Chambers* nor *Washington* held the evidentiary rules in question *facially* unconstitutional.⁴⁵⁰ Rather, in both cases the *application* of the evidentiary rule to the accused was held unconstitutional in light of the facts of the case.

It appears that the Court in *Washington* and *Chambers* was engaged, without express discussion, in a balancing analysis of the type suggested in this Article. An evidentiary rule rarely would be declared *facially* unconstitutional under a right to defend analysis. Since an essential element of the balancing process, as reflected in *Chambers*, is an assessment of the importance of the excluded evidence to the particular defense case,⁴⁵¹ the issue

⁴⁴⁹ *Washington* was, of course, decided on the sixth amendment compulsory process clause, with only brief reference to the right to defend. The ostensible protection afforded by that clause is, however, narrower than the right to defend. Compare *Chambers v. Mississippi*, 410 U.S. 284 (1973), with *Washington v. Texas*, 388 U.S. 14 (1967). But see Westen, *supra* note 114. In *Washington* the excluded evidence was the testimony of the only living eyewitness, other than the accused, to the murder in question; in *Chambers* the excluded evidence indicated the guilt of a third party and the falsity of his repudiation of his confession to the crime for which *Chambers* was charged.

⁴⁵⁰ The Court's reason for refusing to strike down the Texas accomplice disqualification statute in *Washington* is somewhat unclear. The rationale of the decision may have been predicated on the realization that the Texas statute in question had been prospectively repealed before the case reached the Court, but it may also have been the result of a balancing analysis of the type suggested in this Article. The opinion is wholly silent on this point.

⁴⁵¹ In order for an evidentiary rule or statute to *facially* violate the right to present a defense under such a balancing approach, the rule or statute would probably have to be applicable solely to the accused and further no discernible governmental interest whatsoever. While the accomplice disqualification rule involved in *Washington* came close to fitting those specifications, it did seem to further the discernible, if not compelling, state interest in preventing the jury from hearing perjured testimony. Of course, such an argument assumes, as the Court noted in *Washington*, that accomplices customarily will commit perjury more often than other witnesses. 388 U.S. at 22-23. Another rule which may pose *facial* constitutionality problems is the automatic disqualification of persons convicted of certain crimes, in-

posed in evidentiary exclusion cases is, accordingly, whether the evidentiary ruling is appropriate on the facts of each case, rather than whether the evidence rule in question is constitutional.⁴⁵² Thus, *Chambers* did not rule unconstitutional the exclusion of all reliable declarations against penal interest.⁴⁵³ Rather, the Court held that, in the context of the *Chambers* case, the trial court's evidentiary ruling violated due process.

The importance of *Chambers* and *Washington* to evidentiary rulings has not yet been fully perceived by the state and lower federal courts. Most of the cases citing *Chambers*, for example, are cases involving the precise problem framed in that case: the admissibility of a declaration against penal interest offered by the accused.⁴⁵⁴ Even on this precise issue, the courts have failed to recognize the delicate constitutional balancing process required. Rather, the lower courts have tended to seize upon language in the *Chambers* opinion discussing the reliability of the excluded evidence and have made the trustworthiness of the proffered evidence the touchstone of the *Chambers* test.⁴⁵⁵ Such an analysis obscures or eliminates the balancing of interests that *Chambers* and its due process test seemingly require. While reliability and trustworthiness are important to the balancing test, they are not the sole determinants of the result. Rather, since the hearsay rule protects the governmental interest in reliability, other indicia of the trustworthiness of the testimony simply mitigate the weight of that governmental interest in the application of the constitutional balancing test. Therefore, the admission of hearsay evidence with

cluding perjury, from testifying. *See, e.g.*, N.D. CENT. CODE § 31-01-08 (1960) (repealed 1973); OKLA. STAT. ANN. tit. 21, § 506 (Supp. 1975-76); S.D. COMP. LAWS ANN. § 19-1-4 (1967); WASH. REV. CODE ANN. § 5.60.040 (1963). Insofar as such statutes are applied to the prosecution, they seemingly pose no constitutional problem. If applied solely to the accused, however, they may constitute a substantial compulsory process or right to defend violation. Cf. *Holman v. Lawhon*, 362 F.2d 1 (5th Cir. 1966) (raising the compulsory process issue but finding no prejudice due to lack of offer of proof).

⁴⁵²*See, e.g.*, *United States v. Paquet*, 484 F.2d 208, 214 & n.4 (5th Cir. 1973) (Gewin, J., concurring).

⁴⁵³*Contra, State v. Craig*, 192 Neb. 347, 220 N.W.2d 241 (1974); *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973).

⁴⁵⁴*See, e.g.*, *People v. Craven*, 54 Ill. 2d 419, 299 N.E.2d 1 (1973); *People v. Hanks*, 17 Ill. App. 3d 633, 307 N.E.2d 638 (1974); *Ragler v. State*, 18 Md. App. 671, 308 A.2d 401 (1973); *State v. Higginbotham*, 298 Minn. 1, 212 N.W.2d 881 (1973); *State v. Craig*, 192 Neb. 347, 220 N.W.2d 241 (1974); *Commonwealth v. Nash*, 457 Pa. 296, 324 A.2d 344 (1974); *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973).

⁴⁵⁵*See, e.g.*, *United States v. Jenkins*, 496 F.2d 57, 69 (2d Cir. 1974); *United States v. Walling*, 486 F.2d 229, 238-39 (9th Cir. 1973); *People v. Craven*, 54 Ill. 2d 419, 299 N.E.2d 1 (1973); *People v. Hanks*, 17 Ill. App. 3d 633, 307 N.E.2d 638 (1974); *Ragler v. State*, 18 Md. App. 671, 308 A.2d 401 (1973); *State v. Higginbotham*, 298 Minn. 1, 212 N.W.2d 881 (1973).

no extrinsic indicia of reliability might be constitutionally compelled if the evidence is of critical importance to the accused.⁴⁵⁶ Thus, the importance of the testimony to the accused must be balanced against the government's interest in assuring reliability.⁴⁵⁷ Both reliability of the testimony and its importance to the accused are significant in the disposition of the case, but neither should be wholly dispositive.

Those courts that have considered the general impact of *Chambers* and *Washington* on evidentiary rules and their application to the accused are divided. While some decisions suggest that *Chambers* and *Washington* betoken no change in the absolute control which the states have over their rules of evidence and procedure,⁴⁵⁸ some courts are beginning to recognize that cases like *Chambers* and *Washington* add a constitutional dimension to the analysis of any evidentiary problem affecting the exclusion of evidence offered by the criminally accused. For example, the Seventh Circuit, citing *Chambers*, recently said "that technical rules [of evidence regarding the voucher problem] are clearly less significant than fundamental requirements of fairness . . ."⁴⁵⁹ Similarly, the Delaware Supreme Court recently relied on *Chambers* and reversed a conviction because of the trial court's exclusion of important hearsay evidence pertinent to the accused's defense of entrapment,⁴⁶⁰ stating "The hearsay rule may not be applied 'mechanistically' to defeat a right and the ends of justice."⁴⁶¹

The recognition of this constitutional dimension to evidentiary issues affecting the accused's case requires that the trial judge, and of course the appellate courts, must consider the fairness to the defendant of any evidentiary ruling excluding defense evidence. The court must carefully weigh the importance of the challenged evidence to the accused against the governmental interest in reliability and judicial economy. To effectuate that balancing of interests, the court should consider not only the importance of the evidence to the accused but also the substantiality of the gov-

⁴⁵⁶Cf. *Webb v. Texas*, 409 U.S. 95 (1972); *Cool v. United States*, 409 U.S. 100 (1972); *Washington v. Texas*, 388 U.S. 14 (1967). In none of these cases was there any extrinsic confirmation of the reliability of the excluded testimony. Indeed, in *Webb* the alibi testimony which was thwarted by the trial judge's perjury admonitions was seemingly false since the accused had been caught red-handed in the burglary. Yet, in each of these cases, a constitutional violation was found.

⁴⁵⁷Cf. *Commonwealth v. Nash*, 457 Pa. 296, 324 A.2d 344 (1974); *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973).

⁴⁵⁸See, e.g., *Herrin v. State*, 230 Ga. 476, 197 S.E.2d 734, 736 (1973).

⁴⁵⁹*United States v. Booker*, 480 F.2d 1310, 1311 (7th Cir. 1973).

⁴⁶⁰*Kreisher v. State*, 303 A.2d 651 (Del. 1973).

⁴⁶¹*Id.* at 652, quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

ernmental interest in reliability. The analysis will differ from case to case. In hearsay cases, for example, the court might, as in *Chambers*, determine whether other indicia of reliability exist. As in *Chambers*, such indicia might include, *inter alia*, corroboration, the circumstances in which the statement was made, whether it was written or merely oral, or the person to whom it was made. In other situations, different indicia of trustworthiness might be appropriate. For example, where the prosecution's objection to a document offered by the accused is based on the "best evidence" rule, the court may consider whether the copy offered by the accused had been seen by anyone else prior to trial, whether it is handwritten or appears to be a carbon or xerox copy, or whether other copies exist. Each of these considerations is important to assessing the probability of documentary falsification or alteration, and, accordingly, the substantiality of the governmental interest in trustworthiness. Similarly, the court should assess whether the possibility of documentary falsification outweighs the importance of the proffered evidence to the accused's defense. In short, the balancing approach requires that the courts in each case consider how the accused's interest in presenting his defense should be accommodated with the governmental interests in reliability and judicial economy.

Accordingly, while the right to present a defense has an important impact on evidentiary rulings, the use of per se approaches is neither easy nor desirable. Rather, the fairness of the rulings in question must be analyzed on a case-by-case basis, taking into consideration the weight of the respective interests involved. The role played by the right to defend in such an analysis is, as reflected in *Chambers* and *Washington*, to assure that trial and appellate courts do not lose sight of the accused's significant interest in presenting the excluded evidence and to assure that the accused is not unfairly precluded from meeting the charges brought against him by a mechanistic application of the evidentiary rules.

2. *Scientific Evidence: The Right to Introduce the Exculpatory Polygraph, Narco-Interrogation, and Hypnosis Evaluation.*—The law of evidence, consistent with its traditional focus on reliability, has developed an elaborate set of rules governing the types of scientific evidence admissible at trial. Thus, the rules of evidence generally permit the admission of ballistics test results; chemical analysis of drugs and poisons; fingerprints; spectographic and neutron activation analysis of microscopic particles of hair, dirt, wood fragments or the like; and blood analysis.⁴⁶² However, the

⁴⁶²See generally MCCORMICK, *supra* note 357, §§ 206, 209, 211, and cases and materials cited therein.

courts have generally refused to permit scientific tests to be admitted on the issue of credibility and have therefore generally excluded the results of polygraph tests⁴⁶³ and the results of tests performed under so-called "truth serums,"⁴⁶⁴ or hypnosis.⁴⁶⁵ The rationale for excluding the results of these tests has been the lack of general scientific acceptability for such tests.⁴⁶⁶ Exculpatory

⁴⁶³See, e.g., *Marks v. United States*, 260 F.2d 377 (10th Cir. 1958), cert. denied, 358 U.S. 929 (1959); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *United States v. DeBetham*, 348 F. Supp. 1377 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972); *State v. Carnegie*, 158 Conn. 264, 259 A.2d 628, cert. denied, 396 U.S. 992 (1969); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *Mattox v. State*, 240 Miss. 544, 128 So. 2d 368 (1961); *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945); *People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969); *Commonwealth v. Johnson*, 441 Pa. 237, 272 A.2d 467 (1971). See generally *Use of Polygraphs as "Lie Detectors" by the Federal Government, Hearings Before a Subcomm. of the House Comm. on Government Operations*, 88th Cong., 2d Sess., pts. 1-5 (1964); J. REID & F. INBAU, *TRUTH AND DECEPTION: THE POLYGRAPH TECHNIQUE* (1966); Burack, *A Critical Analysis of the Theory, Method and Limitations of the "Lie Detector,"* 46 J. CRIM. L.C. & P.S. 414 (1955); Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855 (1965); Levitt, *Scientific Evaluation of the "Lie Detector,"* 40 IOWA L. REV. 440 (1955); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961); Symposium—*The Polygraph Truth Test*, 22 TENN. L. REV. 711 (1953); Annot., 23 A.L.R.2d 1306 (1952). But see *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972); *United States v. Zeiger*, 350 F. Supp. 685 (D.D.C.), rev'd, 475 F.2d 1280 (D.C. Cir. 1972); *Commonwealth v. A Juvenile*, 313 N.E.2d 120 (Mass. 1974); *State v. Lucero*, 86 N.M. 686, 526 P.2d 1091 (1974); and *State v. Alderete*, 86 N.M. 176, 521 P.2d 138 (1974) (recent cases holding non-stipulated polygraph evidence admissible in certain circumstances).

⁴⁶⁴E.g., sodium pentothal or sodium amyta. See, e.g., *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956); *People v. Cullen*, 37 Cal. 2d 614, 234 P.2d 1 (1951); *People v. McNichol*, 100 Cal. App. 2d 554, 224 P.2d 21 (1950); *Knight v. State*, 97 So. 2d 115 (Fla. 1957); *People v. Harper*, 111 Ill. App. 2d 204, 250 N.E.2d 5 (1969); *People v. Myers*, 35 Ill. 2d 311, 220 N.E.2d 297 (1966), cert. denied, 385 U.S. 1019 (1967); *People v. Brownsky*, 35 Misc. 2d 134, 228 N.Y.S.2d 76 (Ct. Gen. Sess. 1962); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950); *State v. White*, 60 Wash. 2d 551, 374 P.2d 942 (1962). But see *Sallee v. Ashlock*, 438 S.W.2d 538 (Ky. 1969); *Lemmon v. Denver & Rio Grande R.R.*, 9 Utah 2d 195, 341 P.2d 215 (1959) (permitting use of statements made under narco-interrogation in civil cases). See generally *Gall, The Case Against Narco-Interrogation*, 7 J. FOR. SCI. 29 (1962); *Dession, Freedman, Donnelly, & Redlich, Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315 (1953); *Moenssens, Narco-Analysis in Law Enforcement*, 52 J. CRIM. L.C. & P.S. 453 (1961).

⁴⁶⁵See, e.g., *People v. Busch*, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950). See generally *Leyra v. Denno*, 347 U.S. 556 (1954); *Hermon, Use of Hypo-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964); *Teitlebaum, Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case*, 8 ST. LOUIS U.L.J. 205 (1963).

⁴⁶⁶See., e.g., *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *People v. Davis*, 343 Mich.

evidence offered by the accused is often caught up in the sweep of the evidentiary exclusion of polygraph or narco-interrogation evidence. In fact, the bulk of the criminal cases involving such evidence seems to involve cases in which test results of these kinds were offered by the accused.⁴⁶⁷

The problem of the constitutionality of the exclusion of such scientific evidence under a right to present a defense analysis has recently surfaced in several polygraph cases. For example, in *State v. Dorsey*,⁴⁶⁸ the New Mexico Supreme Court held that the trial court in a murder case erred in excluding the results of a polygraph test tending to confirm the accused's assertion that he acted in self-defense. Specifically relying on *Chambers*, the Court assessed the importance of the excluded polygraph evidence to the accused's defense and, finding the evidence critical, held that the due process clause of the fourteenth amendment compelled the admission of the polygraph evidence. On the other hand, in *State v. Galloway*,⁴⁶⁹ the Supreme Court of Iowa seemingly rejected an analogous claim. In *Galloway* the results of a polygraph test unfavorable to the accused were admitted as part of the state's case pursuant to stipulation of the parties. However, the accused was prevented from inspecting the polygraph tapes, cross-examining the state's witness, and presenting his own expert witness to offer an independent interpretation of the results of the test and afford the jury an understanding of the polygraph literature. After the Iowa Supreme Court affirmed the conviction,⁴⁷⁰ *Galloway* petitioned for a federal writ of habeas corpus, claiming that he was denied his sixth amendment rights to confrontation and compulsory process and his due process clause right to present a defense.⁴⁷¹ Stressing the importance of the broad grant of discretionary powers to the trial court in the areas of discovery and

348, 72 N.W.2d 269 (1955); *People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969). It is interesting to note that while the cases generally rest on the lack of scientific acceptability of polygraph tests and narco- or hypno-interrogation, these seem to be the only major areas where arguably scientific testing is systematically excluded. It may well be that the unarticulated premise of these cases is that scientific evidence, no matter how reliable, simply should not be entertained on the issue of credibility.

⁴⁶⁷See, e.g., *People v. McNichol*, 100 Cal. App. 2d 554, 224 P.2d 21 (1950); *People v. Myers*, 35 Ill. 2d 311, 220 N.E.2d 297 (1966), cert. denied, 385 U.S. 1019 (1967); *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950); *State v. White*, 60 Wash. 2d 551, 374 P.2d 942 (1962); *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943).

⁴⁶⁸87 N.M. 323, 532 P.2d 912 (1975).

⁴⁶⁹187 N.W.2d 725 (Iowa 1971).

⁴⁷⁰*Id.*

⁴⁷¹*Galloway v. Brewer*, Civil No. 74-174-2 (S.D. Iowa, filed Feb. 27, 1975), rev'd, 525 F.2d 369 (8th Cir. 1975).

evidentiary matters, the federal court rejected Galloway's claim. Specifically, the district court failed, despite petitioner's reliance on *Chambers*, to find a federal constitutional right to defend:

To say that there is a right to admit testimony of a second expert as to the specific results of the polygraph examination when only one has been agreed to is in effect to say that there is a right to admit polygraph evidence without a stipulation. Iowa law does not provide that right. *Nor can the Court find a constitutional right to admit such testimony when under the federal law polygraph testimony is generally inadmissible.*⁴⁷²

Obviously, neither the Iowa Supreme Court nor the district court in *Galloway* engaged in the type of balancing approach suggested here. Rather, the court's failure to recognize the right to defend simply obscured the problem. Indeed, the district court's suggestion that no federal constitutional protection was involved since federal evidentiary law would also have required exclusion totally ignored the Supreme Court's extension of the constitutional shelter to a declaration against penal interest in *Chambers*, despite the fact that federal evidentiary law would similarly have compelled exclusion.⁴⁷³ While the Eighth Circuit, relying on *Chambers*, recently reversed the district court's decision in *Galloway*,⁴⁷⁴ the confusion over the constraints imposed by the right to defend on the exclusion of exculpatory polygraph evidence continues. Just recently, in *State v. Conner*,⁴⁷⁵ the Iowa Supreme Court rejected a challenge based on *Chambers* and *Dorsey* to such an exclusion.

While *Galloway*, *Dorsey*, and *Conner* appear to be the only cases directly confronting the effect of the right to present a defense upon the exclusion of polygraph evidence, a small but growing number of courts have on nonconstitutional grounds permitted the accused to offer exculpatory polygraph test results.⁴⁷⁶ Under a right to defend analysis, it would seem that the accused has the better side of the argument over admissibility of polygraph evidence, at least where the evidence is critical to the defense. Applying the balancing test, admission of polygraph evidence of-

⁴⁷²*Id.* at 7 (emphasis added).

⁴⁷³*Cf. Donnelly v. United States*, 228 U.S. 243, 272-77 (1913).

⁴⁷⁴*Galloway v. Brewer*, 525 F.2d 369 (8th Cir.), *rev'd* Civil No. 74-174-2 (S.D. Iowa, filed Feb. 27, 1975). The Eighth Circuit reversed on the grounds that *Chambers* required the production of the polygraph tapes and other materials used by the state's experts, and that failure to do so was a violation of the sixth amendment right to confrontation.

⁴⁷⁵241 N.W.2d 447 (Iowa 1976).

⁴⁷⁶See, e.g., *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972); *United States v. Zeiger*, 350 F. Supp. 685 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972). Cf. *State v. Woo*, 84 Wash. 2d 472, 527 P.2d 271 (1974). See generally R. FERGUSON & A. MILLER, POLYGRAPH FOR THE DEFENSE (1974).

ferred by the accused to substantiate his veracity or to discredit important prosecution witnesses would be compelled in most cases since such evidence will generally be vital to establishing the defense case. Moreover, while the government has an interest in assuring the reliability of the proffered evidence, the application of that interest to polygraphs is not compelling for several reasons. First, in those jurisdictions which permit polygraph results to be admitted on the stipulation of the parties,⁴⁷⁷ the courts have already recognized that the results of polygraph or like tests are not so unreliable that they should never be revealed to the jury. Thus, at least in those jurisdictions, the weight of the government's asserted interest in reliability is substantially diminished. Second, the weight of the government's interest in reliability is further diminished by the literature on polygraphs and related tests. Clearly, large segments of American society, including the police, corporate enterprises, and government, use and rely on the polygraph.⁴⁷⁸ Furthermore, even conservative critics of the polygraph estimate the accuracy of the polygraph in the detection of insincerity at 70 percent,⁴⁷⁹ and many of its proponents place the accuracy rate at more than 80 percent.⁴⁸⁰ While these considerations do not impel the use of polygraph evidence in all cases, they clearly diminish the substantiality of the government's interest in excluding *exculpatory polygraph evidence offered by the accused*. Finally, the application of the least restrictive alternative doctrine further diminishes the government's asserted interest in reliability.⁴⁸¹ Given the arguable reliability of the polygraph and related tests, the asserted governmental interest in reliability can be adequately protected without unfairly impeding the right to present a defense by admitting the exculpatory polygraph evidence and permitting the prosecution to cross-examine and offer rebuttal evidence to discredit the polygraph procedure or the accused's interpretation of the test results. Such an approach not only accommodates the accused's right to present a defense and the governmental interest

⁴⁷⁷See, e.g., *Herman v. Eagle Star Ins. Co.*, 283 F. Supp. 33 (C.D. Cal. 1966), *aff'd*, 396 F.2d 427 (9th Cir. 1968); *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); *People v. Davis*, 270 Cal. App. 2d 841, 76 Cal. Rptr. 242 (1969); *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); *State v. McNamara*, 252 Iowa 19, 104 N.W.2d 568 (1960). *But see Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943).

⁴⁷⁸See generally MCCORMICK, *supra* note 357, § 207, at 506-07; J. REID & F. INBAU, *TRUTH AND DECEPTION: THE POLYGRAPH TECHNIQUE* 259-64 (1966).

⁴⁷⁹See, e.g., *Burkey, Privacy, Property and the Polygraph*, 18 LAB. L.J. 79 (1967).

⁴⁸⁰See, e.g., *Use of Polygraphs as "Lie-Detectors" by the Federal Government*, Hearings Before a Subcomm. of the House Comm. on Government Operations, 88th Cong., 2d Sess., pt. 2, at 281; pt. 3, at 359, 429 (1964); MCCORMICK, *supra* note 357, § 207, at 506 n.9.

⁴⁸¹See note 424 *supra* and accompanying text.

in reliability, but also is more consistent with the trend in recent twentieth century evidence law toward allowing the jurors to hear and evaluate the weight of all relevant evidence.⁴⁸²

Thus, the right to present a defense recognized by the Supreme Court in *Chambers* seemingly impels the admission of exculpatory polygraph evidence proffered by the accused where the evidence plays an important role in building the accused's defense. Accordingly, the New Mexico Supreme Court's decision in *Dorsey* and the Eighth Circuit's decision in *Galloway* could auger an important reconsideration of the use in criminal cases of polygraph, narco-interrogation, and hypno-interrogation evidence.

3. *Testimonial Privilege and the Right To Defend.*—Probably one of the most dramatic conflicts between evidentiary rules and the right to present a defense occurs in the area of testimonial privilege. The constitutional conflict arising out of the evidentiary privileges is obvious. In order to enforce the interest in confidentiality protected by the privilege asserted, the privileged communication or information must remain secret, thereby precluding access of the accused, defense counsel, and the criminal trial jury. On the other hand, the accused may require access to privileged information in order to present a defense in the criminal trial. The example which most readily comes to mind is the accused who, knowing that a third party had confessed to an attorney the crime with which the accused has been charged, desires to pierce the attorney-client privilege or the fifth amendment privilege against self-incrimination in order to prove his innocence.⁴⁸³ This hypothetical highlights the fact that some privileges, including the privilege against self-incrimination,⁴⁸⁴ are evidentiary privileges with constitutional origins and therefore may pose conflicts between constitutional provisions⁴⁸⁵. These types of conflicts, while unusual, are not entirely uncommon in the criminal trial.⁴⁸⁶

⁴⁸²See, e.g., *Rosen v. United States*, 245 U.S. 467, 471 (1918).

⁴⁸³Another example arises from the nation's recent unhappy experience with the Watergate crisis which repeatedly called to the nation's attention the conflict between the claimed executive privilege for the Watergate tapes and the Watergate defendants' rights of access to this arguably exculpatory evidence. See, e.g., *United States v. Nixon*, 418 U.S. 683, 711-13 (1974).

⁴⁸⁴U.S. CONST. amend. V.

⁴⁸⁵See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974); *United States v. Reynolds*, 345 U.S. 1, 16 n.9 (1953); *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692) (C.C.D. Va. 1807).

⁴⁸⁶See, e.g., *United States v. Lyon*, 397 F.2d 505, 512-13 (7th Cir.), cert. denied, 393 U.S. 846 (1968); *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967); *State v. Shaw*, 6 Ariz. App. 33, 429 P.2d 667 (1967); *Walden v. State*, 284 So. 2d 440 (Fla. Ct. App. 1973); *State v. Robbins*, 318 A.2d 51, 55-61 (Me. 1974); *State v. Broady*, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974). See generally Comment, *Right of the Criminal De-*

The United States Supreme Court has been somewhat equivocal in developing a framework for accommodating the testimonial privilege with the accused's right to present a defense. In *Washington v. Texas*,⁴⁸⁷ the Court, despite its expansive protection of the sixth amendment guarantee of compulsory process, expressly limited its holding and said :

Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualification for interest.⁴⁸⁸

This language in the *Washington* opinion has been relied upon by the lower courts to suggest that right to defend cases such as *Chambers* have no impact whatsoever on the testimonial privilege problem.⁴⁸⁹

On the other hand, other cases clearly indicate that the Supreme Court in *Washington* did not intend to suggest that the right to present a defense or the sixth amendment guarantee of compulsory process has no ameliorating impact on the accused's ability to pierce testimonial privileges which obstruct the presentation of his defense. Thus, in *Roviaro v. United States*,⁴⁹⁰ the Supreme Court, while recognizing the validity of the informer's privilege,⁴⁹¹ specifically held that the informer's privilege could be pierced where necessary to protect the accused's right to defend. The Court said:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.⁴⁹²

fendant to the Compelled Testimony of Witnesses, 67 COLUM. L. REV. 953 (1967).

⁴⁸⁷388 U.S. 14 (1967).

⁴⁸⁸*Id.* at 23 n.21.

⁴⁸⁹See, e.g., *Walden v. State*, 284 So. 2d 440, 441 (Fla. Ct. App. 1973). See also *United States v. Lyon*, 397 F.2d 505, 512-13 (7th Cir.), cert. denied, 393 U.S. 846 (1968).

⁴⁹⁰353 U.S. 53 (1957).

⁴⁹¹The privilege protects the government's right to withhold from disclosure the identity of persons who furnish it with information about criminal offenses.

⁴⁹²353 U.S. at 60-61. See also *Scher v. United States*, 305 U.S. 251, 254 (1938); *United States ex rel. Drew v. Myers*, 327 F.2d 174, 179-81 (3d Cir.), cert. denied, 379 U.S. 847 (1964); *Wilson v. United States*, 59 F.2d 390 (3d

Similarly, in *Davis v. Alaska*,⁴⁹³ the privilege protected by the secrecy of juvenile court records came into conflict with the accused's sixth amendment confrontation right to cross-examine a juvenile whom the prosecution had used as a state witness. Without questioning the importance of the state's interest in protecting the confidentiality of juvenile records, the Court held that this privilege must yield to the accused's constitutional right to confront and cross-examine the government's witnesses and "to seek out the truth in the process of defending himself."⁴⁹⁴ Thus, the Court found that the constitutional rights to confront adverse witnesses and to present a defense were "paramount" to the conflicting state policy of confidentiality.⁴⁹⁵

More recently, in *United States v. Nixon*,⁴⁹⁶ the Court expressly adopted a constitutional balancing approach for the potential conflict between the fifth and sixth amendment rights to present a defense and the assertion of executive privilege. Chief Justice Burger in his historic opinion for the Court discussed the compulsory process and due process guarantees of the fifth and sixth amendments and then said:

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for con-

Cir. 1932); *Hernandez v. Nelson*, 298 F. Supp. 682 (N.D. Cal. 1968), *aff'd*, 411 F.2d 619 (9th Cir. 1969); *Centoamore v. Nebraska*, 105 Neb. 452, 181 N.W. 182 (1920).

⁴⁹³415 U.S. 308 (1974).

⁴⁹⁴*Id.* at 320. See also *Alford v. United States*, 282 U.S. 687 (1931) (decided on nonconstitutional grounds).

⁴⁹⁵The Court's use of the term "paramount" suggests that it was engaging in the type of balancing suggested by this Article. Indeed, the Court also noted that the state always had the option of preserving the confidentiality of the juvenile record "by refraining from using him [the juvenile] to make out its case." 415 U.S. at 320.

⁴⁹⁶418 U.S. 683 (1974).

fidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.⁴⁹⁷

Thus, despite dicta to the contrary in *Washington v. Texas*,⁴⁹⁸ the Supreme Court has on a number of occasions suggested that testimonial privileges must yield to or somehow be accommodated with the accused's constitutional interests in presenting a defense. Significantly, the Court's response to this question has not varied with the interest served by the privilege. While the purposes of the privileges at issue in *Roviaro* and *Nixon* were the protection of governmental interests in the efficient functioning of the law enforcement and executive processes, the privilege involved in *Davis* was primarily designed to protect the personal interests of the juvenile and to further his rehabilitation and reintegration into society. Thus, the privilege in *Davis* was more like the traditional private privileges of clergymen,⁴⁹⁹ spouses,⁵⁰⁰ physi-

⁴⁹⁷*Id.* at 711-13. See also *id.* at 708-09:

But this presumptive [executive] privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

⁴⁹⁸388 U.S. 14 (1967).

⁴⁹⁹See, e.g., IOWA CODE ANN. § 622.10 (Supp. 1976). See generally MCCORMICK, *supra* note 357, § 77, at 158; Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55 (1963); Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITTS. L. REV. 27 (1967).

⁵⁰⁰See, e.g., CAL. EVID. CODE §§ 980 *et seq.* (1968); N.Y. CIVIL PRAC. LAW § 4502 (McKinney 1963); OKLA. STAT. ANN. tit. 12, § 385 (1960). See gen-

cians,⁵⁰¹ attorneys,⁵⁰² and even the accused's fifth amendment privilege against self-incrimination.⁵⁰³ These privileges, like the juvenile records privilege involved in *Davis*, are intended to protect the confidentiality of certain communications in order to further private interests or institutions deemed societally important, such as the institutions of marriage, religion, or the adversarial legal system.⁵⁰⁴ Yet, the Court's decision in *Davis* suggests that such private privileges are subject to constitutional attack when they significantly impair the accused's opportunity to confront witnesses or to present a defense. And, of course, the Court's decision in *Nixon* indicates that constitutionally based privileges are no less subject to constitutional scrutiny than the privileges created simply by judicial decision or statute.

While the Supreme Court cases suggest that testimonial privileges may not be absolute when they conflict with the right to present a defense, the problems attendant to resolving the conflict often appear insurmountable. Many courts when confronted with such problems, particularly those arising when a defense witness claims a fifth amendment privilege, have held that the claim of privilege is paramount to the rights of the accused and have therefore forced the defendant to be tried without access to the privileged testimony.⁵⁰⁵ On the other hand, a trend

generally, 2 WIGMORE, *supra* note 23, §§ 600-20; Note, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208 (1961).

⁵⁰¹See, e.g., CAL. EVID. CODE §§ 994-1007 (1968); IOWA CODE ANN. § 622.10 (Supp. 1976); N.C. GEN. STAT. § 8-53 (1969). See generally C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT (1958); MCCORMICK, *supra* note 357, §§ 98-105; 8 WIGMORE, *supra* note 23, §§ 2380-84; Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); Long, *Physician-Patient Privilege Statutes Obstruct Justice*, 25 INS. COUNSEL J. 224 (1958).

⁵⁰²See MCCORMICK, *supra* note 357, §§ 87-97; cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4.

⁵⁰³See generally MCCORMICK, *supra* note 357, §§ 114-43.

⁵⁰⁴Of course, in suggesting that private interests are furthered by these testimonial privileges, it is not suggested that society receives no indirect benefits from the private privilege. Indeed, privileges like the clergyman's privilege, the interspousal communications privilege, or the physician's privilege are fostered precisely because the society has made a judgment that the societal well-being will be furthered by fostering private institutions or relationships. However, these privileges, unlike the executive or informer's privileges provide no direct benefit to the efficient functioning of the governmental apparatus.

⁵⁰⁵See, e.g., United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir. 1974); United States v. Gloria, 494 F.2d 477, 480 (5th Cir.), cert. denied, 419 U.S. 995 (1974); United States v. Lyon, 397 F.2d 505, 512-31 (7th Cir.), cert. denied, 393 U.S. 846 (1968); Holloway v. Wolff, 351 F. Supp. 1033, 1037-38 (D. Neb. 1972), rev'd on other grounds, 482 F.2d 110 (8th Cir. 1973); State v.

seems to be emerging in the Supreme Court, in some lower courts,⁵⁰⁶ and among commentators⁵⁰⁷ to recognize that the interests protected by testimonial privileges must somehow be accommodated with or yield to the accused's interest in presenting a defense.

The problem of accommodating the governmental and private interests furthered by testimonial privileges with the accused's constitutional interest in access to exculpatory evidence is much more difficult than the accommodation suggested for other rules of evidence, such as those affecting hearsay evidence or relevance. In nonprivilege areas, the evidentiary problem is generally one of reliability or probative value, either of which raise issues of *degree*. Thus, when the rule of evidence conflicts with the right to present a defense, an accommodation can be reached by allowing the jurors to hear vital defense evidence which has *some* degree of reliability or probative value. The jury, with appropriate instructions, can evaluate the evidence and decide what weight to assign to it. In the privilege area, however, the interest in confidentiality is not generally considered one of degree. Disclosure of the privileged communications, particularly in open court, necessarily vitiates the confidentiality and thereby totally impairs the governmental or private interest the testimonial privilege seeks to protect.

Accommodating the competing interests in confidentiality and the accused's right to defend is not, however, an impossible task. The key to such an accommodation might be found in providing alternative mechanisms to enforce the governmental and private interests furthered by the testimonial privileges.⁵⁰⁸ The search for such alternatives necessarily requires a close analysis of the interests served by the testimonial privileges. In the area of governmental privileges, the interest appears to be the simple necessity of secrecy for certain governmental operations. The informer's privilege prevents disclosure of the informer's identity which might impair the informer's efficiency and possibly endanger the informer's life.⁵⁰⁹ In the area of executive privilege

Shaw, 6 Ariz. App. 33, 429 P.2d 667 (1967); Thompson v. State, 480 S.W.2d 624, 628 (Tex. Crim. App. 1972).

⁵⁰⁶See, e.g., United States v. Leonard, 494 F.2d 955, 984-85 (D.C. Cir. 1974) (Bazelon, J., dissenting); Earl v. United States, 364 F.2d 666 (D.C. Cir. 1966) (Leventhal, J., dissenting from denial of petition for rehearing en banc); State v. Broady, 321 N.E.2d 890 (Ohio Ct. App. 1974).

⁵⁰⁷See, e.g., MCCORMICK, *supra* note 357, § 143, at 308; Westen, *supra* note 114, at 159-77; Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967); Note, *A Re-examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972).

⁵⁰⁸See discussion at notes 579-82 *infra* and accompanying text.

⁵⁰⁹See generally Roviaro v. United States, 353 U.S. 53 (1957).

the argument is persuasively advanced that the executive department cannot function if the advice which the President receives confidentially from advisers is continuously subject to public scrutiny. The fear is that advice will become less candid and considerably more guarded.⁵¹⁰ Thus the governmental privileges are designed almost exclusively to protect an interest in "governmental privacy" in those areas of operation where such privacy is thought necessary for the effective functioning of the governmental processes.⁵¹¹

Many of the private privileges are designed to protect private interests in privacy. Privileges are granted in these areas of private concern because the relationships in question involve emotionally sensitive disclosures and public invasion of the delicate details of personal lives might inhibit disclosures necessary to the attainment of an individual's health, religious well-being, or of legal rights. The privileges, thus, represent a societal judgment that the free flow of communications in these areas is so important that it is necessary to assure that the relationship cannot be cast into public glare by involuntary judicial disclosure.

Many of the private privileges also rest in part on an effort to protect against self-incrimination. Obviously, the fifth amendment privilege against self-incrimination protects that policy, but other testimonial privileges also serve the same purpose. The attorney-client privilege, the clergyman's privilege, and the psychotherapist's privilege all involve situations in which the communications involved pose a substantial risk of the disclosure of illegal activities. In such circumstances the grant of privilege also represents a societal judgment that the relationship or institution involved is so important that it should not be constrained by inhibitory fears that disclosure of information by the client, patient, or parishioner will lead or contribute to his prosecution. The private testimonial privileges, thus, tend to be grounded on the dual and overlapping rationales of protecting privacy and protecting certain relationships from the inhibiting fears of potential self-incrimination and prosecution.⁵¹²

⁵¹⁰See generally *United States v. Nixon*, 418 U.S. 683 (1974).

⁵¹¹In addition to protecting the identity of informers and the privacy of interdepartmental executive communications, privileges preserve the privacy of other areas of governmental activity. See, e.g., *United States v. Nixon*, 418 U.S. 683, 706 (1974) (military, diplomatic, or national security secrets); *Alderman v. United States*, 394 U.S. 165 (1969) (covert domestic law enforcement operations); *United States v. Reynolds*, 345 U.S. 1 (1953) (military secrets); *Chicago & S. Airlines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (international intelligence operations); *Clark v. United States*, 289 U.S. 1, 13 (1933) (jury deliberations).

⁵¹²The one privilege that appears to be grounded on neither a self-incrimination nor a privacy consideration is the privilege which disqualifies one spouse

Recognition that most privileges are designed to protect privacy or prevent self-incrimination provides the key to the balancing process required by the right to defend. The cases in which the accused desires to pierce a testimonial privilege will, of course, involve the assertion of a privilege by third parties or a government agency other than the prosecution. Defense witnesses may assert the privilege and their clients, spouses, or parishioners may also assert it. The conflict of interests is, therefore, not one between the *prosecution* and the defense, but rather between a governmental agency or private persons and the accused. Thus, if the right to defend is to be guaranteed, some way should be found to accommodate the privacy or self-incrimination interests of such third parties and the accused's right to present a defense.

Of course, the accommodation is required only if the privileged evidence sought by the accused is sufficiently vital to the defense. Thus, the initial task in any case where a privilege is claimed in contravention of the rights of the accused must be an attempt to evaluate the importance of the testimony to the accused. In some cases, particularly those involving claims of the fifth amendment privilege, the determination of the importance of the privileged testimony may be easy, either because of the witness' involvement in the crime or because the substance of the expected testimony is known from prior breaches of confidentiality not rising to the level of a waiver of the privilege. On the other hand, in most cases the substance of the privileged testimony is unknown and, accordingly, evaluation of its importance to the accused is difficult. Unlike other evidentiary problems, no offer of proof can be made with respect to most privileged testimony since the substance of the communication is unknown. The solution to this apparent bottleneck in the process of constitutional analysis would seem to be the same solution adopted in other areas in which secrecy is important: *in camera* evaluation by the court.⁵¹³ Clearly, such *in camera* examination significantly protects the privilege interest in privacy and confidentiality while permitting the court to apply the balancing test required by the right to present a defense. On the other hand, *in camera* examination still poses a substantial

from testifying in some criminal cases *against* the other spouse without the consent of the latter. MCCORMICK, *supra* note 357, § 66. While this privilege is sometimes said to protect family harmony, it is today thought to be "an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation that is today outmoded." *Id.* at 145-46. In any event, this particular privilege can never come into conflict with the accused's right to present a defense since it is applicable only in a situation in which the *prosecution* attempts to utilize one spouse's testimony *against* the other spouse.

⁵¹³See, e.g., *Alderman v. United States*, 394 U.S. 165, 180-85 (1969).

threat of disclosing incriminating privileged evidence. The solution to that problem may be to cloak such disclosures with criminal immunity.⁵¹⁴

Significantly, in some privilege areas the courts have already begun to develop standards to determine if privileged evidence is important to the defense. For example, in the area of the informer's privilege, the Supreme Court has rejected an automatic approach to making available to the accused the identity of an informer.⁵¹⁵ Instead, the Court has suggested that an informer's identity must be made available only where the issue for which the accused desires the privileged information "[is] the fundamental one of innocence or guilt."⁵¹⁶ Thus, the privilege can be pierced to obtain evidence relating to substantive issues of guilt or affirmative defenses, such as entrapment or insanity, but cannot be pierced if the evidence is only relevant to claims of procedural illegality.⁵¹⁷ This approach is entirely consistent with the Supreme Court's renewed emphasis on protecting those constitutional guarantees which relate essentially to the determination of guilt or innocence.⁵¹⁸ Given the important societal and private interests generally served by testimonial privileges, the dividing line advanced in the Supreme Court cases may provide a useful point of demarcation for deciding whether the evidence sought by the defense is sufficiently important for the trial court to embark on a consideration of whether a privilege should be pierced. Thus, in some cases, the court will be able, even without *in camera* examination, to determine whether the privileged information sought by the accused is sufficiently important to the defense. If defense counsel represents that the privileged information is sought due to its potential relevance to procedural matters, no further inquiry need be made. The accused's claim should simply be rejected. On the other hand, *in camera* inquiry is necessary if the evidence is thought to be exculpatory or relevant to some affirmative defense.

In camera examination of exculpatory, privileged information merely begins the inquiry. If the trial judge, after *in camera* examination of the privileged material, concludes that the evidence sought by the accused is in fact important to the defense,

⁵¹⁴See discussion at notes 520-45 and accompanying text *infra*. Cf. *Kastigar v. United States*, 406 U.S. 441 (1972). *Simmons v. United States*, 390 U.S. 377 (1968). Of course, a sealed record must be made of the *in camera* examination for purposes of appeal.

⁵¹⁵See *McCray v. Illinois*, 386 U.S. 300 (1967).

⁵¹⁶*Id.* at 309.

⁵¹⁷E.g., fourth amendment violations. Compare *McCray v. Illinois*, 386 U.S. 300, 309-11 (1967), with *Roviaro v. United States*, 353 U.S. 53, 61-64 (1957).

⁵¹⁸See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-46 (1973).

the balancing test still requires the court to weigh the importance of the governmental or societal interest advanced by the privilege against the accused's interest in securing the exculpatory privileged evidence. One factor which weighs heavily in such a constitutional balancing is whether the confidential information protected by the privilege can be adequately protected by other means. Since the primary interests protected by the testimonial privileges are those of preventing self-incrimination and protecting privacy, at least two possible alternatives appear available: granting immunity and conducting that portion of the trial in which privileged information is disclosed in secret, under appropriate protective orders. While each of these alternatives poses certain problems under prevailing doctrines, they may be constitutionally compelled under a right to defend balancing test as long as the society and the government demand continued protection of privileged information.⁵¹⁹

In recent years, some lower courts⁵²⁰ and commentators⁵²¹ have argued that the right to present a defense and the compulsory process clause compels the court or the prosecution to grant immunity to important defense witnesses claiming the fifth amendment privilege. However, the present weight of authority seems opposed to making immunity available to defense witnesses in order to facilitate the accused's defense.⁵²² Probably the most significant judicial pronouncement on this issue came in the case of *Earl v. United States*,⁵²³ in which the District of Columbia

⁵¹⁹It is important to remember that all testimonial privileges are created by law—either by constitutional mandate, judicial decision, or statute. With the possible exception of the privilege against self-incrimination, none of the privileges have been thought to be inherent rights. Thus, the government, in creating the testimonial privilege, has in some cases deprived the accused of the means of securing evidence to prove his innocence. As discussed in sections I and II of this Article, it was precisely the unfairness in the Crown's efforts during the 15th and 16th centuries to weight criminal procedure to the advantage of the Crown and to deny the accused access to exculpatory evidence and witnesses which led to the fifth and sixth amendments. Clearly, there is a continuing unfairness in permitting the government to try the accused while simultaneously depriving him, by whatever means, of the evidence needed to formulate his defense and prove his innocence. Cf. *United States v. Powell*, 156 F. Supp. 526 (N.D. Cal. 1957).

⁵²⁰See cases cited note 505 *supra*.

⁵²¹See authorities cited note 507 *supra*.

⁵²²See *United States v. Lyon*, 397 F.2d 505, 512-13 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968); *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967); *State v. Shaw*, 6 Ariz. App. 33, 429 P.2d 667 (1967). Cf. *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974); *Holloway v. Wolff*, 351 F. Supp. 1033 (D. Neb. 1972), *rev'd on other grounds*, 482 F.2d 110 (8th Cir. 1973); *Walden v. State*, 284 So. 2d 440 (Fla. Ct. App. 1973); *Thompson v. State*, 480 S.W.2d 624 (Tex. Crim. App. 1972).

⁵²³361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

Court of Appeals held, in an opinion by then Circuit Judge (now Chief Justice) Burger, that the court could not judicially create for the benefit of the accused a witness immunity procedure comparable to that made available to the prosecution by congressional statute. Although the appellant in *Earl* had urged the availability of immunity as a due process requirement,⁵²⁴ Justice Burger's opinion rested in great part on a judgment that the judiciary was *statutorily* powerless to grant immunity. First, without reference to any supporting precedent, Judge Burger asserted that the judiciary was powerless to order the executive branch to invoke its statutory authority to grant immunity. The problem, of course, with this argument is that a court does have the power to dismiss the prosecution and can, as some commentators have noted,⁵²⁵ exercise that power to put the prosecution to the choice of either granting immunity to vital defense witnesses or dismissing the prosecution. Second, Judge Burger noted that no statutory authority permitted the court to grant immunity to defense witnesses and that the judiciary was powerless, absent congressional action, to create such procedures.⁵²⁶ Of course, that argument ignores a long history of judicially created procedures designed to secure access to evidence material to the accused, particularly where constitutionally mandated.⁵²⁷

In any event, *Earl* and many of the other cases rejecting the granting of immunity to defense witnesses predate *Washington v. Texas*,⁵²⁸ *Webb v. Texas*,⁵²⁹ *Chambers v. Mississippi*⁵³⁰ and other recent cases showing a trend toward an increased protection of the accused's right to present a defense. Thus, cases like *Earl* should be reexamined in light of the constitutional balancing test advanced in this Article. Since a grant of immunity provides an

⁵²⁴The appellant in *Earl* apparently relied upon the following due process holding of *Brady v. Maryland*, 373 U.S. 83 (1963):

[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87. The court distinguished *Brady* and rejected appellant's argument that the government had suppressed a witness who claimed a fifth amendment privilege. Indeed, the government had transported the witness from a federal prison and produced him in court. 361 F.2d at 534.

⁵²⁵See, e.g., Westen, *supra* note 114, at 170; Note, *A Reexamination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 90-91 (1972).

⁵²⁶361 F.2d at 534.

⁵²⁷See, e.g., *Alderman v. United States*, 394 U.S. 165 (1969); *Roviaro v. United States*, 353 U.S. 53 (1957).

⁵²⁸388 U.S. 14 (1967).

⁵²⁹409 U.S. 95 (1972).

⁵³⁰410 U.S. 284 (1973).

alternative which impedes the right to defend less drastically than an unqualified recognition of the witness' right to claim privilege at the expense of the accused, the grant of immunity would seem constitutionally compelled under the balancing test suggested herein.⁵³¹ Furthermore, other recent constitutional developments also suggest that immunity must be constitutionally available to the accused as a vehicle for securing defense testimony. In *Wardius v. Oregon*,⁵³² for example, the Supreme Court held that the due process clause precludes granting the prosecution broad discovery rights under alibi-notice statutes without granting reciprocal discovery to the accused. Clearly, the prosecution's power to seek use immunity for its own witnesses affords it significant access to evidence and testimony which would otherwise be unavailable due to claims of privilege.⁵³³ To deny the defendant reciprocal access to exculpatory evidence by refusing to grant immunity to defense witnesses may violate not only the right to present a defense but also the *Wardius* reciprocity principle.⁵³⁴ Thus, a substantial and compelling constitutional argu-

⁵³¹See, e.g., *State v. Broady*, 321 N.E.2d 890 (Ohio Ct. App. 1974) (decided in part on state law grounds):

Justice would seem to require that immunity from prosecution based upon the testimony of a witness should not be denied solely because such testimony would tend to exonerate a defendant in a criminal case, and be granted only when such testimony would tend to convict the defendant.

Id. at 895.

⁵³²412 U.S. 470 (1973).

⁵³³See generally *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar*, the Court explicitly recognized that the grant of immunity was the primary vehicle for accommodating the concept of privilege with the necessity of testimony:

Immunity statutes, which have historical roots deep in Anglo-Saxon jurisprudence, are not incompatible with these values. Rather, they seek the rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.

Id. at 445-46 (footnote omitted). Certainly the demands are neither less compelling nor less legitimate where the accused seeks exculpatory evidence than where the prosecution seeks evidence necessary for prosecution.

⁵³⁴In *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967), the court partially recognized the reciprocity principle advanced herein. Thus, in a footnote, Judge (now Chief Justice) Burger noted:

We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the

ment exists, despite contrary precedent, for affording the accused the ability to pierce claims of testimonial privilege by compelling the court or prosecution to grant immunity.

It should be noted that while the immunity debate has centered exclusively around claims of the fifth amendment privilege against self-incrimination, the grant of immunity may be necessary to pierce other privileges as well. For example, the interest protected by the attorney-client privilege, the clergyman's privilege, or the psychotherapist's privilege, is in part one of preventing the disclosure of incriminating information gleaned from the client, patient or parishioner. In such cases it may be necessary to grant use immunity to the source of the disclosure (*i.e.* the client, the patient or the parishioner) in order to pierce the privilege on behalf of the accused. Interestingly, in some cases the source of the disclosure may be neither the accused nor a defense witness. The chain of analysis in such cases would be lengthy, and therefore more complicated than in other situations. Moreover, the privilege should not be pierced without some effort to accommodate the interest of the sources of confidential disclosures. If piercing the privilege would result confidential disclosures being the core of prosecution, use immunity should be utilized to protect the interests of the sources.

Just as immunity can be used to accommodate the interest in preventing self-incrimination resulting from piercing privileges, the closing of the criminal trial to the public and the issuance of protective orders imposing a cloak of secrecy on all necessary remaining participants can also partially accommodate interests in privacy while making necessary evidence available to the accused. Even though the sixth amendment and the due process clause guarantee the accused a public trial,⁵³⁵ the cases

same mechanism available to the accused. Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government.

Id. at 534 n.1.

Significantly, in *Wardius v. Oregon*, 412 U.S. 470 (1973), the Supreme Court's analysis differed slightly from that of the circuit court in *Earl*. Rather than analyzing the conduct of the parties in the particular case (*Wardius* had entirely failed to comply with the alibi-notice statute which was at issue), the Court discussed the problem from the standpoint of the reciprocity of the *statutory scheme*. That difference in approach is, of course, vital to the question of whether the accused can compel the grant of immunity to vital defense witnesses.

⁵³⁵See, e.g., *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969). Although it is not entirely clear that the sixth amendment right to a public trial has been expressly incorporated into the fourteenth amendment due process clause, the Supreme Court has assumed that it had already done so. In *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972), Justice Douglas stated that *In re Oliver*, 333 U.S. 257, 272 (1948), held that the public trial guarantee

strongly suggest that the trial judge has discretion to temporarily close the criminal trial if a secret hearing is necessary to secure important testimony,⁵³⁶ to protect the secrecy of governmental investigations and the safety of government undercover agents,⁵³⁷ or to protect certain vulnerable witnesses.⁵³⁸ Similarly, the Supreme Court's approval of *in camera* inspection in wiretapping cases,⁵³⁹ while obviously involving preliminary matters rather than the trial itself, further suggests that certain accommodations must be made to the guarantee of a public trial. Even without such case support, the accused would be hard pressed to demand that the privilege be pierced while refusing to waive the right to public trial temporarily during the testimony of a witness disclosing privileged communications.

Since these alternatives of granting immunity and conducting closed, secret hearings significantly accommodate the interests protected by testimonial privileges while still affording the accused the evidence needed to present a defense, the asserted governmental interest in the privilege becomes less compelling in the constitutional balancing process. Thus, in many cases where a claim of testimonial privilege conflicts with the right to defend, the accused should be able to pierce the privilege by compelling a grant of immunity or by permitting the testimony to be received in a closed hearing under appropriate protective orders.

Of course, in some cases, particularly those involving the various governmental privileges, the government may be un-

"was applicable to a state proceeding." 407 U.S. at 28. This interpretation is surprising since *In re Oliver* pre-dated the advent of the modern incorporation doctrine. Similarly, the state courts have assumed that the public trial guarantee is protected by the due process clause. See, e.g., *People v. Hinton*, 31 N.Y.2d 71, 286 N.E.2d 265 (1972); cf. *Riley v. State*, 83 Nev. 282, 284-85, 429 P.2d 59, 61 (1967). See generally Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U.L. REV. 1138 (1966).

⁵³⁶See, e.g., *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir.), cert. denied, 384 U.S. 1008 (1965); *Riley v. State*, 83 Nev. 282, 429 P.2d 59 (1967); *People v. Hagan*, 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835, cert. denied, 396 U.S. 886 (1969). But cf. *State v. Valasquez*, 76 N.M. 49, 412 P.2d 4 (1966).

⁵³⁷See, e.g., *People v. Hinton*, 31 N.Y.2d 71, 286 N.E.2d 265 (1972); *People v. Pacuicca*, 134 N.Y.S.2d 381 (Bronx County Ct. 1954), aff'd, 286 App. Div. 996, 144 N.Y.S.2d 711 (1955).

⁵³⁸See, e.g., *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), cert. denied, 386 U.S. 964 (1967) (purporting to protect "a twenty-three year old [white] virgin who was shot, raped four times by a Negro syphilitic and his confederate, and left naked on a sparsely inhabited country road in near freezing weather," *id.* at 890, because she was required to relate the "lurid details of [the] crime." *Id.* at 891); *United States v. Geise*, 158 F. Supp. 821 (D. Alaska), aff'd, 262 F.2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959) (protecting children who were the victims of or witnesses to statutory rape).

⁵³⁹See, e.g., *Alderman v. United States*, 394 U.S. 165, 180-85 (1969).

willing to disclose the necessary evidence even with appropriate safeguards and protective orders. In cases involving the identity of informers, military secrets, or executive privilege, the government understandably may be unwilling to disclose privileged information to the accused and to the jurors. Similarly, the government may be unwilling to acquiesce in the grant of use immunity to important defense witnesses claiming a fifth amendment privilege. In such circumstances the breach of the privilege or the grant of immunity are not absolutely necessary. Rather, the government can be put to an election of either dismissing the prosecution, supplying the desired information, or granting immunity. Indeed, the remedy of dismissal is precisely the one chosen by the Supreme Court in the context of the informer's privilege. The Court held that if the government refused to disclose the informer's identity, the prosecution must be dismissed.⁵⁴⁰ Similarly, this remedy has been suggested in cases involving state secrets⁵⁴¹ and other governmental privileges,⁵⁴² and has been applied in cases in which the government claimed to have lost evidence needed by the accused⁵⁴³ or placed witnesses beyond the accused's reach.⁵⁴⁴ One commentator, while predicated his analysis exclusively on the compulsory process clause, succinctly summarized the constitutional choice placed on the prosecution as follows:

⁵⁴⁰Roviaro v. United States, 353 U.S. 53 (1957).

Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Id. at 60-61 (footnotes omitted and emphasis added).

⁵⁴¹United States v. Coplon, 185 F.2d 629 (2d Cir. 1950):

[T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished [is] greater than the disclosure of such "state secrets" as might be relevant to the defense.

Id. at 638. See also United States v. Reynolds, 345 U.S. 1, 12 (1953); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).

⁵⁴²See, e.g., Christoffel v. United States, 200 F.2d 734, 738-39 (D.C. Cir. 1952); United States v. Schneiderman, 106 F. Supp. 731, 734-38 (S.D. Cal. 1952); State v. Cooper, 2 N.J. 540, 553-57, 67 A.2d 298, 304-06 (1949).

⁵⁴³See, e.g., United States v. Augenblick, 393 U.S. 348, 355-56 (1969); United States v. Perry, 471 F.2d 1057, 1063 (D.C. Cir. 1972) (dictum); United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971); cf. Application of Newbern, 175 Cal. App. 2d 862, 864-65, 1 Cal. Rptr. 80, 82 (1959); Johnson v. State, 249 So. 2d 470 (Fla. Ct. App. 1973) (holding formally predicated on confrontation clause rather than right to present a defense). But cf. People v. Eddington, 53 Mich. App. 200, 207-09, 218 N.W.2d 831, 835-36 (1974).

⁵⁴⁴See, e.g., United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974); United States v. Carrillo-Frausto, 500 F.2d 234, 236 (9th Cir. 1974) (Goodwin, J., dissenting); United States v. Mendez-Rodriguez, 450 F.2d 1, 4-5 (9th Cir. 1971); United States v. Powell, 156 F. Supp. 526 (N.D. Cal. 1957).

If the government prefers to assert its privilege it must proceed without the testimony of witnesses impeachable by the privileged evidence, or, if the government withholds evidence forming an essential element of either the prosecution's or the defendant's case, it must waive the prosecution. Compulsory process does not deny the government's interest in secrecy, but prohibits the government from invoking secrecy at the defendant's expense.⁵⁴⁵

Of course, the problem is further complicated where private privileges are involved and the witness continues to refuse to testify despite grants of use immunity, appropriate protective orders, and the threat of contempt. In such situations the government has done everything possible to secure for the accused the benefit of the information sought. Since the due process clause protects only against governmental action which obstructs the right to defend, no constitutional deprivation is involved where the non-governmental witness, claiming privilege, is simply recalcitrant. Therefore, dismissal would be constitutionally inappropriate in such circumstances.

From the foregoing discussion it is evident that the right to defend requires a reexamination of the inviolability of testimonial privileges when the evidence sought is vital to the accused's defense. The reexamination suggests that the accused should in certain cases be afforded the tools of piercing the privilege: the grant of use immunity and the holding of secret hearings under protective orders. In cases in which the government refuses to disclose material defense evidence or to grant immunity, dismissal of the prosecution may be constitutionally required.

B. "The Preclusion Sanction": Procedural Default and the Right To Defend

The increased codification and formalization of criminal procedure, particularly pretrial discovery procedures, during the twentieth century has led to a new obstruction of the right to defend: the exclusion of defense evidence as a sanction for failure to comply with procedural rules or orders.⁵⁴⁶ One commentator has aptly dubbed this pitfall in the modern criminal trial the "preclusion sanction,"⁵⁴⁷ an appropriately descriptive label which will be used herein to refer to exclusion of defense evidence for procedural default.

The preclusion sanction has most commonly been used in connection with statutes or rules requiring the accused to give

⁵⁴⁵Westen, *supra* note 114, at 163.

⁵⁴⁶See, e.g., FED. R. CRIM. P. 16(e).

⁵⁴⁷See generally Note, *Preclusion Sanction*, *supra* note 307, at 1342.

pretrial notice of affirmative defenses and the names, addresses, and expected testimony of the witnesses who will be called to support the defenses. The alibi-notice statutes or rules are the most common procedures of this type,⁵⁴⁸ but such special pleading and discovery procedures have also been adopted for the insanity defense and other matters.⁵⁴⁹ While some of these statutes and rules either contain no express remedy for violation⁵⁵⁰ or limit the judge's discretion to granting continuances or recesses to the prosecution when the accused has failed to comply,⁵⁵¹ other jurisdictions permit⁵⁵² or require⁵⁵³ the exclusion of defense evidence. In some jurisdictions the preclusion sanction provided is limited to the testimony of defense witnesses and does not include that of the accused,⁵⁵⁴ but in others the web cast by the preclusion sanction ensnares even the accused.⁵⁵⁵

As already noted, the United States Supreme Court has twice been confronted with the constitutionality of the preclusion sanction and, while noting that the sanction raises serious constitutional issues, reserved the issue in each instance.⁵⁵⁶ Although there is a plethora of cases upholding the exclusion of proffered alibi evidence pursuant to such procedures,⁵⁵⁷ some cases, apparently recognizing the constitutional implications of the preclusion sanction, tend to take the conservative approach of re-

⁵⁴⁸In 1972, sixteen states were reported to have adopted alibi-notice rules or statutes. *Id.* at 1342 n.4. See, e.g., FLA. R. CRIM. P. 3.200; IOWA CODE ANN. § 777.18 (1950); KAN. STAT. ANN. § 22-3218 (Cum. Supp. 1973); N.Y. CRIM. PRO. LAW § 250.10 (McKinney 1971); OKLA. STAT. ANN. tit. 22, § 585 (1969). See also FED. R. CRIM. P. 12.1(e).

⁵⁴⁹In 1972, fourteen states had notice of insanity or other special pleading rules. Note, *Preclusion Sanction*, *supra* note 307, at 1342 n.5. See, e.g., ARIZ. R. CRIM. P. 192(A) (1956); IOWA CODE ANN. § 777.18 (1950); KAN. STAT. ANN. § 22-3218 (Cum. Supp. 1973); MICH. COMP. LAWS ANN. §§ 768.20-21 (1969). See also FED. R. CRIM. P. 12.2(d).

⁵⁵⁰See, e.g., IOWA CODE ANN. § 777.18 (1950).

⁵⁵¹See, e.g., OKLA. STAT. ANN. tit. 22, § 585 (1969).

⁵⁵²See, e.g., FLA. R. CRIM. P. 3.200.

⁵⁵³See, e.g., KAN. STAT. ANN. § 22-3218(4) (Cum. Supp. 1973).

⁵⁵⁴See, e.g., FED. R. CRIM. P. 12.1(e).

⁵⁵⁵See, e.g., KAN. STAT. ANN. § 22-3218(4) (Cum. Supp. 1973).

⁵⁵⁶See *Wardius v. Oregon*, 412 U.S. 470, 472 n.4 (1973); *Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). See also *Braswell v. Florida*, 400 U.S. 873 (1970) (Black, J., dissenting from denial of certiorari).

⁵⁵⁷See, e.g., *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *State v. Adair*, 106 Ariz. 4, 469 P.2d 823 (1970); *People v. Hall*, 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (1970); *Chester v. State*, 276 So. 2d 76 (Fla. Ct. App. 1973); *People v. Cline*, 8 Ill. App. 3d 917, 290 N.E.2d 622 (1972); *Aikens v. State*, 289 N.E.2d 152 (Ind. Ct. App. 1972); *State v. Rourick*, 245 Iowa 319, 60 N.W.2d 529 (1953); *State v. Collins*, 209 Kan. 534, 498 P.2d 103 (1972); *State v. Nunn*, 113 N.J. Super. 161, 273 A.2d 366 (1971); *Commonwealth v. Porter*, 220 Pa. Super. 222, 281 A.2d 701 (1971); *State v. Anderson*, 25 Utah 2d 26, 474 P.2d 735 (1970); *Swonger v. State*, 54 Wis. 2d 468, 195 N.W.2d 598 (1972).

quiring the state to exhaust other remedies or to demonstrate prejudice before the preclusion sanction can be invoked.⁵⁵⁸ Very few of the decisions upholding the application of the preclusion sanction address its constitutionality, and the few courts which have discussed the issue in alibi-notice cases are evenly divided on the subject.⁵⁵⁹

The leading pronouncements on the constitutionality of the preclusion sanction are found in Justice Black's opinion dissenting from the denial of a writ of certiorari in *Braswell v. Florida*,⁵⁶⁰ which rejects the constitutionality of the preclusion sanction, and the Wisconsin Supreme Court's opinion in *State ex rel. Simos v. Burke*,⁵⁶¹ which upholds its constitutionality. *Braswell* involved the application of the preclusion sanction for the violation of a sequestration order, and Justice Black, joined by Justices Douglas and Brennan, desired to decide the issue of the constitutionality of the sanction.⁵⁶² Specifically, Justice Black said he would "hold that Florida cannot enforce a mere procedural rule by denying a criminal defendant his constitutional right to present witnesses on his own behalf."⁵⁶³ Relying on the sixth amendment compulsory process clause and the Court's decision in *Washington v. Texas*,⁵⁶⁴

⁵⁵⁸Cf., e.g., *Bradford v. State*, 278 So. 2d 624 (Fla. 1973); *Dancy v. State*, 259 So. 2d 208 (Fla. Ct. App. 1972); *Founts v. State*, 87 Nev. 165, 483 P.2d 654 (1971); *Commonwealth v. Shider*, 209 Pa. Super. 133, 224 A.2d 802 (1966); *State v. Ovitt*, 126 Vt. 320, 229 A.2d 237 (1967).

⁵⁵⁹*Braswell v. Florida*, 400 U.S. 873 (1970) (Black, J., dissenting from denial of certiorari), and *Gilday v. Commonwealth*, 360 Mass. 170, 274 N.E.2d 589 (1971), suggest that the preclusion sanction may be unconstitutional, while *Rider v. Crouse*, 357 F.2d 317, 318 (10th Cir. 1966), *State v. Wardius*, 6 Ore. App. 391, 394-95, 487 P.2d 1380, 1383-84 (1971), *rev'd on other grounds sub. nom. Wardius v. Oregon*, 412 U.S. 470 (1973), and *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 136-38, 163 N.W.2d 177, 180 (1968), support its constitutionality.

⁵⁶⁰400 U.S. 873 (1970) (Black, J., dissenting).

⁵⁶¹41 Wis. 2d 129, 163 N.W.2d 177 (1968).

⁵⁶²The Court had reserved this issue during its prior Term in *Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970).

⁵⁶³400 U.S. at 873.

⁵⁶⁴*Id.* at 873, citing *Washington v. Texas*, 388 U.S. 14 (1967). In light of *Washington*, cases arising under alibi-notice rules can usually be easily resolved utilizing a sixth amendment compulsory process analysis together with the incorporation doctrine where necessary. Since the testimony of the alibi witness is *totally excluded* for noncompliance, there is a close analogy to *Washington*. On the other hand, there are good reasons why cases like *Washington* should be decided under a due process right to defend analysis, thereby reserving the compulsory process clause for situations which its language and history expressly cover—the denial of subpoena or related process to afford the accused the opportunity to have his witnesses present at the trial. See generally note 386 *supra*. Without such limitations the doctrines of the compulsory process clause, which are generally analyzed as per se rules and commonly do not lend themselves well to the balancing approach advanced

Justice Black argued that the state rule of procedure, while admittedly designed to protect the "fairness" of the trial, could not be used "to destroy a sacred constitutional right."⁵⁶⁵ In short, he demanded that Braswell be granted "the right to present his side of the story"⁵⁶⁶ despite noncompliance with the sequestration order. As discussed below, Justice Black's views ultimately prevailed in the Fifth Circuit after Braswell applied for and secured a writ of habeas corpus.⁵⁶⁷

The approach of the Wisconsin Supreme Court in the *Simos* case was, of course, radically different. The *Simos* opinion reads the compulsory process clause and the decision in *Washington* to prevent only the adoption of rules which "[constitute] an absolute ban on certain categories of witnesses being called to testify by the defense."⁵⁶⁸ Since the Wisconsin alibi-notice statute did not absolutely ban alibi evidence, but merely conditioned its admission on advance notice by the accused, the court found the statute constitutional.⁵⁶⁹

While it is easy to understand how the accused's reliance on the compulsory process clause led the Wisconsin Supreme Court to the decision it reached in *Simos*, it would seem that Justice Black's opinion in *Braswell* reached the correct constitutional result. Under the balancing test required in analyzing right to defend cases, it is difficult to perceive how the preclusion sanction can ever be constitutionally applied for failure to give advance notice of an affirmative defense.

In cases involving the application of the preclusion sanction for default on procedures requiring pretrial notice of affirmative defenses, such as alibi or insanity, the excluded evidence is inherently vital since it goes to the heart of the issue of guilt.⁵⁷⁰ Thus, the only question posed in such cases is whether the procedural interests advanced by the notice rule outweigh the

herein, would quickly pose major obstacles to many of the traditional criminal procedures discussed in this section. Compare Westen, *supra* note 114 at 130-31.

⁵⁶⁵400 U.S. at 873.

⁵⁶⁶*Id.*

⁵⁶⁷*Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972). See discussion at notes 595-98 and accompanying text *infra*.

⁵⁶⁸41 Wis. 2d at 134, 163 N.W.2d at 182. The Wisconsin Supreme Court's reading of the scope of protection afforded by the compulsory process clause and the decision in *Washington* suggests the problems of uncertainty of the scope of constitutional protection engendered by reliance on the compulsory process clause rather than on the broader and more general concept of the right to defend.

⁵⁶⁹*Id.* The court also applied the same analysis to hold that the preclusion sanction, when applied to the accused, did not violate the Wisconsin constitutional right of the accused "to be heard by himself and counsel," WIS. CONST. art. I, § 7. *Id.* at 180-81.

⁵⁷⁰*Cf. Roviaro v. United States*, 353 U.S. 53 (1957).

accused's obviously important interest in introducing evidence supporting an affirmative defense. Therefore, rules providing the preclusion sanction for procedural defaults relating to pretrial notice of affirmative defense are one of the few areas where facial statutory challenges are possible under the right to defend.⁵⁷¹ Since the accused's interest is fixed and weighed by the fact that the notice is required for an *affirmative defense* and since the governmental procedural interest is not variable, the constitutionality of the preclusion sanction contained in such rules and statutes is subject to facial attack.

Under the right to defend balancing test, the constitutionality of the preclusion sanction for violation of an alibi-notice statute depends on the weight assigned to the procedural interest in requiring pretrial notice of the defense and supportive witnesses. The reason usually advanced for such pretrial notice rules was summarized by the Supreme Court in *Williams v. Florida*.⁵⁷² The Court said that such rules are "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."⁵⁷³ Some courts and commentators have somewhat more dramatically restated the same interest by suggesting that the rule is an effort to prohibit the "manufactured" alibi defense created by the "sudden 'popping-up' of witnesses to prove that the accused was not at the scene of the crime at the time of its commission . . .".⁵⁷⁴ The question then is whether this procedural interest is sufficiently compelling to outweigh the accused's interest in presenting a defense.

Several reasons mandate a conclusion that this procedural interest is not sufficiently compelling. First, available remedial alternatives exist that are less violative of the right to defend and still protect the procedural interests in question. The most ob-

⁵⁷¹Obviously the availability of per se rules in this area does not mean that every case in which the testimony of an alibi witness is excluded for noncompliance with an alibi-notice statute is unconstitutional. Where, for example, the defendant has given notice that he will call 10 alibi witnesses and desires at trial to present an 11th witness whose testimony is wholly cumulative, the marginal utility of that 11th witness' testimony should tip the constitutional scales in favor of exclusion. *But cf. Commonwealth v. Shider*, 209 Pa. Super. 133, 224 A.2d 802 (1966).

⁵⁷²399 U.S. 78 (1970).

⁵⁷³*Id.* at 82. See generally Epstein, *Advance Nature of Alibi*, 55 J. CRIM. L.C. & P.S. 29 (1964); Samuels, *Notice of Alibi*, 121 NEW LAW J. 321, 322 (1971); Comment, *The Alibi-Witness Rule: Sewing Up the "Hip Pocket" Defense*, 11 SANTA CLARA LAWYER 155 (1970).

⁵⁷⁴See *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 143, 163 N.W.2d 177, 180 (1968); *State v. Kopacka*, 261 Wis. 70, 75, 51 N.W.2d 495, 498 (1951); Comment, *The Alibi-Witness Rule: Sewing Up the "Hip Pocket" Defense*, 11 SANTA CLARA LAWYER 155 (1970).

vious alternative is granting the prosecution a continuance in situations in which there has been no compliance with the pretrial notice requirements. This alternative was specifically approved by the Supreme Court in *Williams*,⁵⁷⁵ and the Oklahoma alibi-notice statute is apparently enforced primarily through this device.⁵⁷⁶ Presumably the continuance affords the prosecution the opportunity to investigate the newly disclosed defense and the adversary system is thereafter relied upon to separate truth from falsehood.⁵⁷⁷ The preclusion sanction is therefore not essential for effective enforcement of such pretrial notice rules. While it might be argued that noncompliance with alibi-notice rules necessarily suggests a "manufactured" alibi defense,⁵⁷⁸ alternatives short of total exclusion of the alibi evidence can be used to protect against suspected perjury.⁵⁷⁹ Some commentators have, for example, suggested that the prosecution be permitted to comment to the jury on the accused's failure to comply with the pretrial notice requirements or that the jury be given special instructions on the inference which may be drawn from failure to comply.⁵⁸⁰

⁵⁷⁵399 U.S. at 85-86.

⁵⁷⁶See generally *Tubbs v. State*, 512 P.2d 1385 (Okla. Crim. 1973); *Connery v. State*, 499 P.2d 462 (Okla. Crim. 1972). Both cases construe the Oklahoma alibi-notice statute, OKLA. STAT. ANN. tit. 22, § 585 (1969), to be enforced through continuances rather than preclusion.

⁵⁷⁷It has been suggested that the alibi-notice rules and their attendant preclusion sanctions are designed to prevent the need for such lengthy, costly, and disruptive continuances in the criminal trial. See, e.g., *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 133-34, 163 N.W.2d 177, 182 (1968); Proposed Fed. R. Crim. P. 12.1, Advisory Committee Note, 62 F.R.D. 271, 294-95 (1974). Yet many of the statutes utilize the continuance as one of the primary remedial devices for the accused's noncompliance with their pretrial notice requirements. See, e.g., OKLA. STAT. ANN. tit. 22, § 585 (1969). Furthermore, those who would insist on application of the preclusion sanction to avoid costly or disruptive continuances are insisting on economic efficiency at the expense of the accused's right to defend. Thus, even in areas such as the insanity defense, where the delay for examination and evaluation of the accused may be substantial (unlike the problem posed by the "last-minute" alibi defense), the least drastic alternative test would suggest that the continuance, rather than the preclusion sanction, be used.

⁵⁷⁸Obviously in areas of affirmative defense other than alibi, such as insanity, the evidence needed to establish the defense is less likely to be easily manufactured. For example, in the insanity defense context, the necessity of expert testimony renders the defense inherently more difficult to fabricate. Thus, in such areas the purposes of pretrial notice requirements are not preventing perjury and allowing the prosecution time to prepare, but merely furthering interests in prosecutorial discovery. Cf. *Wardius v. Oregon*, 412 U.S. 470 (1973).

⁵⁷⁹Indeed, the total exclusion of evidence on a priori assumptions that it was likely to be perjured was precisely the constitutional fault found with the Texas rule disqualifying coprincipals and accomplices in *Washington v. Texas*, 388 U.S. 14, 22 (1967).

⁵⁸⁰See, e.g., Note, *Preclusion Sanction*, *supra* note 307, at 1358-59.

While such alternatives are not themselves wholly free of constitutional problems,⁵⁸¹ they are certainly more consistent with the modern trend in testimonial competence which admits suspect evidence and leaves its weight and credibility to be determined by the trier of fact.⁵⁸²

A second reason for finding that no compelling interests requires the application of the preclusion sanction for noncompliance with alibi-notice-type statutes is that the sanction undercuts the very purpose of the rule. As the Supreme Court said in *Williams*, these rules are intended "to enhance the search for truth in the criminal trial"⁵⁸³ by assuring that both sides are equally prepared to meet the other's arguments and evidence. Excluding the accused's evidence regarding an affirmative defense is a peculiarly ironic and inappropriate way to further "the search for truth." The sanction leaves the parties no better prepared; rather, it inhibits the search for truth by rendering the criminal trial virtually an *ex parte* proceeding in which only the prosecution's case is presented. Not only is this result inconsistent with the purposes of the rule, but it obviously conflicts with the right to defend and the American jurisprudential assumptions of the importance and necessity for the adversary system in the search for truth.⁵⁸⁴

Finally, while it might be argued that noncompliance with the pretrial notice rule waives the right to defend, such an analysis is seemingly untenable under existing federal waiver law. Under federal waiver doctrine, not only must waiver of a constitutional trial guarantee designed to further the search for truth satisfy the *Johnson v. Zerbst*⁵⁸⁵ test of "an intentional relinquishment or abandonment of a known right or privilege,"⁵⁸⁶ but the facts evidencing the waiver must also affirmatively appear in the record since waiver of a constitutional right cannot be presumed from simple silence.⁵⁸⁷ Interpreting as a waiver the mere failure to give pretrial notice of an affirmative defense therefore contravenes the *Zerbst* standard because such an interpretation presumes a constitutional waiver from the accused's silence since in

⁵⁸¹See *Cool v. United States*, 409 U.S. 100 (1972), and *Griffin v. California*, 380 U.S. 609, 614 (1965), for analogies suggesting the unconstitutionality of such comments or instructions on the grounds that they obstruct the right to defend and the compulsory process clause and diminish, in violation of due process of law, the prosecution's burden of proving the accused guilty beyond a reasonable doubt.

⁵⁸²See, e.g., *Rosen v. United States*, 245 U.S. 467, 471 (1918).

⁵⁸³399 U.S. at 82.

⁵⁸⁴Cf. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

⁵⁸⁵304 U.S. 458 (1938).

⁵⁸⁶*Id.* at 464.

⁵⁸⁷See cases cited note 430 *supra*.

the normal case nothing will appear in the record reflecting the fact that the accused has intentionally abandoned his right to defend. Indeed, it might be suspected that the failure to give pretrial notice is commonly a result of defense counsel's oversight, clerical error, or ignorance of the rule.⁵⁸⁸ To attribute a waiver of the right to defend to the accused because of defense counsel's oversight, error, or ignorance does considerable violence to the principle that waivers of federal rights must be personal decisions of the accused rather than an act or omission of counsel alone.⁵⁸⁹ In a closely related context, the Florida courts have

⁵⁸⁸Although it might be argued that cases in which the procedural default was caused by defense counsel's neglect, ignorance, or mistake should be analyzed as sixth amendment ineffective assistance of counsel problems, the fallacy of that position is dramatically illustrated by *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 163 N.W.2d 177 (1968). In that case defense counsel in a hit-and-run case failed, for no apparent reason, to give pretrial notice of an alibi defense involving only the accused's testimony. As a result, the accused was precluded from testifying that he was elsewhere at the time of the accident and his defense was, accordingly, entirely excluded. While the accused unsuccessfully attacked the constitutionality of the alibi-notice statute and its preclusion sanction, he also claimed ineffective assistance of counsel. The court's response to that contention is set forth in full here because it is so typical of the way most appellate courts respond to claims of ineffective assistance of counsel:

Finally, petitioner contends that, based solely on trial counsel's election not to give notice of alibi at the time of trial, we should find trial counsel incompetent and determine that defendant was denied his constitutional right to counsel at the time of trial. Petitioner's defense attorney at the trial was an experienced member of the bar, having practiced since 1950. Review of the record clearly establishes that trial counsel energetically fought for his client's interest, effectively cross-examined witnesses for the state, eloquently pleaded for consideration in the sentencing phase of the case. The election not to give notice of alibi, standing alone, is not sufficient basis for finding that defendant was denied the effective assistance of competent counsel.

Id. at 140, 163 N.W.2d at 182. Since there is nothing in the facts of the case to suggest a reason for failing to file the pretrial notice, the court's characterization of this failure as an "election" seems to be nothing but a conclusory label which masks the true nature of the oversight or mistake involved. The problem, of course, is that the standard of review is so narrow and the burden of proof so heavy where claims of ineffective assistance of counsel are made that the courts will rarely hold that defense counsel's simple oversight in failing to file the required pretrial notice constitutes ineffective assistance despite its devastating impact on the accused's defense. Cf. *Bruce v. United States*, 379 F.2d 113, 116-117 (D.C. Cir. 1967); *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963) (suggesting the loss of a substantive defense as a criterion for finding ineffective assistance of counsel). See generally Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

⁵⁸⁹See, e.g., *Fay v. Noia*, 372 U.S. 391, 439 (1963). But see *Estelle v. Williams*, 96 S.Ct. 1961 (1976), discussed in note 430 *supra*.

recognized this problem and have explicitly required the trial court to ascertain the reasons for the procedural default in order to prevent the accused from being penalized due to the neglect or error of his counsel.⁵⁹⁰

Thus, rules and statutes calling for the application of the preclusion sanction for failure to give required notice of affirmative defenses are fraught with seemingly insurmountable constitutional problems and are probably facially unconstitutional.⁵⁹¹ Of course, the problem posed by application of the preclusion sanction for defaults on more general procedural rules not specifically involving affirmative defenses is more complex. This problem is most likely to arise when the preclusion sanction is applied to the accused for procedural default on general pretrial discovery rules.⁵⁹² While there is a marked lack of reported cases in this area,⁵⁹³ the cases which have been reported indicate a reluctance to apply the preclusion sanction, particularly where less drastic remedies are available, because of the fashion in which this sanction deprives the accused of the right to defend.⁵⁹⁴ Application of the right to defend balancing test in such cases does not permit facial attacks on the applicable rule or statute because the excluded evidence and its importance to the accused

⁵⁹⁰See *Bradford v. State*, 278 So. 2d 624, 625 (Fla. 1973); *Wilson v. State*, 220 So. 2d 426, 427 (Fla. 1969). Where failure to give a pretrial notice is the result of defense counsel's lack of diligence or ignorance, contempt or discipline by the bar are more appropriate sanctions than punishing the accused for the errors of his counsel. Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rules 6-101, 7-101(a)(3).

⁵⁹¹See Note, *Preclusion Sanction*, *supra* note 307, at 1342.

⁵⁹²See, e.g., *Picot v. State*, 280 So. 2d 693 (Fla. Ct. App. 1973); *Bradford v. State*, 278 So. 2d 624 (Fla. Ct. App. 1973); *Dancy v. State*, 259 So. 2d 208 (Fla. Ct. App. 1972); *Wilson v. State*, 220 So. 2d 426 (Fla. Ct. App. 1969); *State v. Sickles*, 144 Wash. 236, 257 P. 385 (1927).

⁵⁹³Significantly, despite the availability of the preclusion sanction as a remedy for violations of general discovery rules such as Federal Rule of Criminal Procedure 16(d) (2), very few reported cases discuss this sanction outside of the context of rules requiring pretrial notices of affirmative defenses. Indeed, no reported case could be found in which the preclusion sanction set forth in prior federal rule 16(d)(2) had ever been applied *against the accused*. The federal and state judges seem reluctant to exclude evidence as a sanction for noncompliance with pretrial discovery procedures. But cf. *Symposium—Discovery in Criminal Cases*, 44 F.R.D. 481, 488 (1967) (comments of Stephen E. Kaufman, Chief of the Criminal Division, United States Attorney's Office, Southern District of New York, suggesting that pretrial discovery cannot be effective in criminal cases without a willingness on the part of judges to invoke the preclusion sanction). Most of the litigation over application of the preclusion sanction against the accused in a general discovery context centers around rules requiring or permitting the prosecution and defense to exchange a list of witnesses. See cases cited note 592 *supra*.

⁵⁹⁴See, e.g., *Williams v. State*, 264 So. 2d 106 (Fla. Ct. App. 1972); *Wilson v. State*, 220 So. 2d 426 (Fla. Ct. App. 1969).

will vary from case to case. Thus, as with cases involving exclusion of testimony on evidentiary grounds, the importance of the evidence to the accused must be closely scrutinized on a case-by-case basis in order to apply the balancing test. Nevertheless, the considerations discussed above in analyzing the alibi-notice rule, especially the discussion of alternative available remedies, are still relevant to analyzing the weight to be assigned to the governmental interest in procedural regularity. That analysis suggests that applying the preclusion sanction to the accused would in most cases be constitutionally suspect. The application of the preclusion sanction in these cases should survive constitutional challenge only when the evidence excluded is not very important to the accused or, in the unusual case, where other means of effectuating the state's interest are practically unavailable.

The Fifth Circuit's decision in *Braswell v. Wainwright*⁵⁹⁵ illustrates the application of the foregoing analysis. *Braswell* involved the same conviction which elicited Justice Black's dissent from the denial of certiorari discussed above.⁵⁹⁶ The case reached the Fifth Circuit after Braswell successfully petitioned for a writ of habeas corpus, claiming that his federal constitutional rights were violated because the trial court applied the preclusion sanction as a remedy for a defense witness' unintentional violation of a sequestration order. Braswell had been convicted of aggravated assault, and the excluded witness was the only eyewitness whose testimony would have tended to confirm the accused's claim of self-defense. Noting that the excluded testimony was vital to the defense because it was the only testimony corroborating Braswell's claims of self-defense,⁵⁹⁷ the court held that the application of the preclusion sanction under the particular facts of this case denied Braswell compulsory process and due process of law. In discussing the due process claim, the Fifth Circuit's opinion touches upon several of the right to defend cases discussed above and concludes that the application of the preclusion sanction "effectively denied Braswell the right to present a defense in his behalf."⁵⁹⁸ Thus, the Fifth Circuit not only rested its decision on the right to present a defense, but it specifically applied the balancing test outlined above.

Recently the United States Supreme Court had a further occasion to discuss the preclusion sanction in *United States v. Nobles*.⁵⁹⁹ While the Supreme Court rejected the accused's sixth

⁵⁹⁵463 F.2d 1148 (5th Cir. 1972).

⁵⁹⁶See discussion at notes 560-66 and accompanying text *supra*.

⁵⁹⁷463 F.2d at 1157.

⁵⁹⁸*Id.*

⁵⁹⁹422 U.S. 225 (1975).

amendment challenge to the invocation of the preclusion sanction in *Nobles*, the Court's decision is not definitive regarding the use of the preclusion sanction for procedural default on pretrial discovery rules. Unlike the problems posed in the foregoing discussion, *Nobles* arose out of defense counsel's express refusal to obey a court order issued during the trial to produce an edited version of the report of a defense investigator whom counsel intended to call as a defense witness. The investigator's proposed testimony concerned his interviews with key prosecution witnesses and was offered to show their prior inconsistent statements to the investigator. When defense counsel refused to produce the report, the trial court excluded the investigator's testimony. After holding that no privilege or discovery rule sheltered the investigator's report from disclosure at trial, the Court briefly turned to and rejected the defendant's sixth amendment challenge to the preclusion sanction. Specifically, Justice Powell, writing for a unanimous Court, said:

The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. Deciding, as we do, that it was within the court's discretion to assure that the jury hear the full testimony of the investigator rather than a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgment.⁶⁰⁰

It should be evident from this quotation that the Court's reaction to the use of the preclusion sanction in *Nobles* was a direct product of the unusual context in which the issue arose. Unlike the problems often posed by default on an alibi-notice statute, *Nobles* involved a deliberate refusal to produce rather than a possibly inadvertant default. Furthermore, unlike the solutions to problems posed in the area of pretrial discovery, no less restrictive alternative remedy was available in *Nobles*. Since defense counsel desired to utilize the investigator's testimony of his conversations with prior witnesses for purposes of testimonial impeachment, only the full context of those prior statements would protect the government's interest in truthful testimony. Thus, *Nobles* did not present an inadvertant failure to comply with notice or discovery rules curable by late compliance at trial coupled with a continuance. No other remedial alternative appears to have been available in *Nobles*.⁶⁰¹ Thus, while *Nobles* in-

⁶⁰⁰*Id.* at 241.

⁶⁰¹While it might be argued that an adequate alternative was available

dicates that the Court may be willing to accept the use of the preclusion sanction in extreme cases, the opinion does not definitively resolve the more complex question of the constitutional propriety of invoking the preclusion sanction for the failure to comply with various types of common pretrial discovery rules.

C. The Right To Defend and Access to Defense Evidence

A number of issues concerning access to defense evidence or witnesses arise during the criminal trial. Such problems include, *inter alia*, pretrial discovery of exculpatory material, physical access to witnesses for pretrial preparation, prosecutorial or judicial efforts to discourage defense witnesses from testifying, and continuances to assure the availability of defense witnesses. Since the right to defend rests on the ability to present exculpatory witnesses, these problems of access, while not always traditionally analyzed as compulsory process or right to defend problems,⁶⁰² clearly involve issues which go to the core of the right to present a defense. Obviously, resolution of such constitutional problems also requires a balancing approach. In each case the importance of the defense evidence sought must be weighed against whatever governmental interest is advanced by blocking or obstructing access to the information or witnesses sought. Since this balancing approach and its application has already been discussed extensively, the discussion in this section will be limited to the manner in which access problems emerge in the criminal trial and the prevailing judicial responses to the problems.

1. *Brady v. Maryland* and Constitutional Discovery.—The United States Supreme Court's pretrial discovery decision in *Brady v. Maryland*,⁶⁰³ while formally predicated on a simple fairness requirement under the due process clause of the fourteenth amendment, presented but one aspect of the right to present a defense. Specifically, *Brady* held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process

in the form of the investigator's oral testimony from the stand, this argument does not withstand close analysis. First, the Court was concerned with the prosecution's ability to prepare to cross-examine the defense investigator. Without access to his report, such cross-examination was rendered significantly more hazardous. *Id.* at 231-32. Second, and equally important, a significant dispute apparently existed as to the content of the prosecution witnesses' conversations with the defense investigator. These conversations apparently occurred some time before trial, since the prosecution witnesses' memory of them was hazy. *Id.* In this context the investigator's contemporaneous notes or report would appear to be the best indication of their content, since the investigator's memory might be equally subject to lapse. Thus, no less restrictive remedial alternative than the production of the investigator's report existed.

⁶⁰²See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963).

⁶⁰³373 U.S. 83 (1963).

where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution."⁶⁰⁴ While the precedents upon which *Brady* relied had little to do with the right to defend,⁶⁰⁵ it is now clear that *Brady* provides a broad constitutional right of the accused to discover upon request⁶⁰⁶ any evidence in the prosecutor's possession useful to the accused's presentation of a defense.⁶⁰⁷

The scope of constitutional discovery appears quite broad. It is clear, for example, that the *Brady* rule covers evidence regarding the reliability of a prosecution witness whose testimony

⁶⁰⁴*Id.* at 87.

⁶⁰⁵*Brady's* holding emerged from the Court's precedents finding the prosecution's knowing solicitation, use, or failure to correct false testimony to be a violation of due process. See, e.g., *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935). These decisions, unlike *Brady*, were designed to prevent various types of prosecutorial misconduct, rather than to further the accused's efforts to defend. Cf. *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting) ("This standard is well calculated to prevent the kinds of prosecutorial misconduct which vitiate the very basis of our adversary system, and yet to provide a firm line which halts short of broad, constitutionally required, discovery rules."). But cf. *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952).

⁶⁰⁶Some of the lower court cases have suggested that a request is unnecessary for invocation of the *Brady* rule. See, e.g., *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 137 (2d Cir. 1964); *United States v. Leta*, 60 F.R.D. 127 (M.D. Pa. 1973); *United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971). However, *Brady* and its progeny seem to expressly require the accused to request the exculpatory evidence. See 373 U.S. at 87. See also *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972).

⁶⁰⁷See, e.g., *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *United States v. Hauff*, 473 F.2d 1350 (7th Cir.), cert. denied, 412 U.S. 907 (1973); *United States ex rel. Raymond v. Illinois*, 455 F.2d 62 (7th Cir. 1971); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968); *Guerrero v. Beto*, 384 F.2d 886 (5th Cir. 1967); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); *United States v. Eley*, 335 F. Supp. 353 (N.D. Ga. 1972); *United States v. Leichtfuss*, 331 F. Supp. 723, 735-36 (N.D. Ill. 1971); *United States v. Ladd*, 48 F.R.D. 266 (D. Alaska 1969); cf. *Commonwealth v. Balliro*, 349 Mass. 505, 515-18, 209 N.E.2d 308, 314-16 (1965); *State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973) (both predicated on state constitutional provisions). See generally *TRIAL MANUAL 3 FOR THE DEFENSE OF CRIMINAL CASES* § 270 (Amer. College of Trial Lawyers & ALI-ABA Joint Comm. on Continuing Legal Educ. 1974). Comment, *Oregon's Procedure for Disclosure of Exculpatory Evidence in Criminal Actions*, 50 ORE. L. REV. 354 (1971); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

is important to the determination of guilt.⁶⁰⁸ The boundaries of constitutional discovery, as suggested in *Brady*, are determined by whether the evidence sought is favorable to the accused and "material either to guilt or to punishment."⁶⁰⁹ This line of constitutional demarcation closely parallels the one chosen in *Roviaro v. United States*⁶¹⁰ for the point of compelled disclosure of an informer's identity.⁶¹¹ Thus, the Supreme Court has steered a rather consistent course in accommodating the right to defend with other prosecutorial or government interests.

Another important issue which arises under *Brady* is the timing of the required disclosure of evidence favorable to the accused. While many courts hold that *Brady's* "upon request"⁶¹² language requires pretrial disclosure if an appropriate request is made,⁶¹³ a few courts have suggested or inferred that *Brady* is sufficiently satisfied if sometime during the trial the exculpatory evidence is disclosed.⁶¹⁴ Once the courts recognize that the *Brady* decision rests not on an effort to prevent "suppression" of favorable evidence, as its language suggests,⁶¹⁵ but on the right to present a defense, it is clear that disclosure must be made sufficiently early to facilitate effective defense use of the favorable material.⁶¹⁶

⁶⁰⁸See, e.g., *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968); *Guerrero v. Beto*, 384 F.2d 886 (5th Cir. 1967); *Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961); *United States v. Leichtfuss*, 331 F. Supp. 723, 735-36 (N.D. Ill. 1971); cf. *Jencks v. United States*, 353 U.S. 657 (1957); 18 U.S.C. § 3500 (1970) (the "Jencks Act").

⁶⁰⁹373 U.S. at 87.

⁶¹⁰353 U.S. 53 (1957).

⁶¹¹See notes 515-18 *supra* and accompanying text.

⁶¹²373 U.S. at 87.

⁶¹³See, e.g., *United States v. Eisenberg*, 469 F.2d 156, 160 (8th Cir. 1972); *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), cert. denied, 393 U.S. 1105 (1969); *United States v. Myers*, 327 F.2d 174 (3d Cir. 1964); *United States v. Eley*, 335 F. Supp. 353 (N.D. Ga. 1972); *United States v. Ahmad*, 53 F.R.D. 186 (M.D. Pa. 1971); *United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971); *United States v. Ladd*, 48 F.R.D. 266 (D. Alaska 1969).

⁶¹⁴See, e.g., *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969).

⁶¹⁵373 U.S. at 87.

⁶¹⁶See, e.g., TRIAL MANUAL 3 FOR THE DEFENSE OF CRIMINAL CASES § 270, at 1-285 (Amer. College of Trial Lawyers & ALI-ABA Joint Comm. on Continuing Legal Educ. 1974). A particularly interesting problem is presented by the juxtaposition of the *Brady* rule requiring pretrial disclosure of exculpatory material and the Jencks Act, 18 U.S.C. § 3500 (1970), which permits disclosure of certain government documents, including investigative statements of witnesses, only after the witness has testified on direct examination at trial. If Jencks Act material is favorable to the accused in a particular case, it would also fall under the *Brady* rule. Thus, if *Brady*

Closely related constitutional problems of access to favorable evidence commonly occur in other ways. For example, defense requests for inspection of grand jury minutes raise similar problems which the right to defend balancing test is well equipped to address.⁶¹⁷

2. *Physical Access to Defense Evidence and the Right To Defend.*—Right to defend issues may also arise from governmental rules or actions which obstruct access by the accused or his counsel to potential defense witnesses or evidence. Although the government rarely obstructs defense efforts to interview or present defense witnesses without reason, such obstruction has in fact occurred in many instances in which the government sought to further interests unrelated to the criminal trial. Such cases have often been analyzed on compulsory process grounds,⁶¹⁸ but they commonly do not involve denial of the right to subpoena witnesses and thus are better and more flexibly analyzed under a right to present a defense analysis rather than the per se approach of the sixth amendment.

One frequent source of conflict over access to defense witnesses arises from rules or regulations which prevent or obstruct the interviewing of jail or penitentiary inmates. When a potential defense witness is incarcerated, defense counsel may be unable to gain access to the witness for pretrial interviews in order to determine whether the witness could contribute to the defense case.⁶¹⁹ Obviously, in excluding defense counsel from the jail or prison, the government is seeking to preserve prison security and routine or to protect the prisoner's privacy. While these interests may be entitled to some weight, the majority of

requires pretrial disclosure in order to facilitate the right to present a defense, a clear conflict exists between the Jencks Act and the Constitution on the timing of the required disclosure, and the Jencks Act might, in such a case, be considered unconstitutional as applied. Compare *United States v. Quinn*, 364 F. Supp. 432 (N.D. Ga. 1973); *United States v. Eley*, 335 F. Supp. 353, 357 n.3 (N.D. Ga. 1972); and *United States v. Gleason*, 265 F. Supp. 880 (S.D.N.Y. 1967), which suggest the potential unconstitutionality of the Jencks Act in this respect, with *United States v. Eisenberg*, 469 F.2d 156, 160 (8th Cir. 1972), which seemingly ignores the issue.

⁶¹⁷Cf. *Dennis v. United States*, 384 U.S. 855 (1966); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *Harris v. United States*, 433 F.2d 1127 (D.C. Cir. 1970); *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968); *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967); *FED. R. CRIM. P. 6(c)*. See generally Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony*, 48 WASH. L. REV. 423 (1973); Annot., 3 A.L.R. Fed. 29 (1970).

⁶¹⁸See, e.g., *United States v. Powell*, 156 F. Supp. 526, 530 (N.D. Cal. 1957).

⁶¹⁹See, e.g., *Commonwealth v. Balliro*, 349 Mass. 505, 515-18, 209 N.E.2d 308, 314-16 (1965); *State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973).

the recent cases suggest that the accused's interest in securing exculpatory evidence is paramount and, therefore, defense access to incarcerated witnesses is constitutionally compelled,⁶²⁰ at least where such witnesses are within the custody of the prosecuting jurisdiction or the prosecuting jurisdiction could secure access to the witness.⁶²¹

Another problem of physical access to witnesses has recently emerged in the context of criminal prosecutions for violations of the nation's immigration laws. One recurrent problem which has surfaced is the deportation of illegal aliens who are potential witnesses in immigration prosecutions. The Ninth Circuit has recently developed a rule to accommodate the accused's due process interest in securing access to these aliens before they are deported by requiring that such witnesses be retained within the national boundaries by the immigration authorities until the defense counsel or the court can interview them to determine whether they have material evidence helpful to the accused.⁶²² The Ninth Circuit's decision was expressly grounded on a due process right to defend analysis.⁶²³

A related and somewhat novel problem of access to defense witnesses was posed in *United States v. Powell*.⁶²⁴ The obstruction encountered by the defense in *Powell* was not a govern-

⁶²⁰See, e.g., *Bray v. Peyton*, 429 F.2d 500 (4th Cir. 1970); *Wilson v. State*, 93 Ga. App. 229, 91 S.E.2d 201 (1956); *Hodgins v. State*, 139 Fla. 226, 226-30, 190 So. 875, 876 (1939); *Commonwealth v. Balliro*, 349 Mass. 505, 515-18, 209 N.E.2d 308, 314-16 (1965); *State v. Gangner*, 73 Mont. 187, 235 P. 703 (1925); *State v. Berstein*, 372 S.W.2d 57 (Mo. 1963), cert. denied, 376 U.S. 953 (1964); *Exleton v. State*, 30 Okla. Crim. 224, 235 P. 627 (1925); *State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973); *Hamilton v. State*, 68 Tex. Crim. 419, 153 S.W. 331 (1913); *Bobo v. Commonwealth*, 187 Va. 774, 48 S.E.2d 213 (1948). But cf. *State v. Clark*, 125 Kan. 791, 266 P. 37 (1928); *State v. Goodson*, 116 La. 388, 40 So. 771 (1906); *Commonwealth v. French*, 357 Mass. 356, 259 N.E.2d 195 (1970); *Commonwealth v. Carita*, 356 Mass. 132, 142-43, 249 N.E.2d 5, 11 (1969) (right of access limited to prisoners who consent to interrogation); *Commonwealth v. Doherty*, 353 Mass. 197, 229 N.E.2d 267 (1967), cert. denied, 390 U.S. 982 (1968); *State v. Storrs*, 112 Wash. 675, 192 P. 984 (1921).

⁶²¹Cf. *State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973).

⁶²²See, e.g., *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971); *United States v. Romero*, 469 F.2d 1078 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973); *Ferrari v. United States*, 244 F.2d 132 (9th Cir.), cert. denied, 355 U.S. 873 (1957). But see *United States v. Carrillo-Frausto*, 500 F.2d 234 (9th Cir. 1974) (trial court's decision to release alien juveniles who were witnesses to the alleged crime arose out of concern for welfare of the juveniles and did not deny the accused his right to defend).

⁶²³See, e.g., *United States v. Mendez-Rodriguez*, 450 F.2d 1, 4-5 (9th Cir. 1971).

⁶²⁴156 F. Supp. 526 (N.D. Cal. 1957).

mental limitation on the witness' freedom of movement, as in the foregoing cases, but rather one imposed on defense counsel. *Powell* involved the sedition prosecution of three defendants for writing articles critical of the United States Armed Forces in a periodical published in the People's Republic of China during the Korean War. As part of the pretrial proceedings, the defendants sought to take depositions in Peking of several residents of the People's Republic of China and North Korea in order to prove that the allegedly seditious statements were true. Since the United States had not diplomatically recognized the People's Republic of China, the prosecution objected, and the Department of State refused to validate defense counsel's passport. After considerable pretrial maneuvering by the defendants in order to secure entry to the People's Republic, it became apparent that the inability of the defendants to secure access to the defense witnesses was a direct result of the United States' diplomatic posture toward the People's Republic of China and the State Department's consequent refusal to validate defense counsel's passport. Although the district court recognized that it lacked jurisdiction in a criminal proceeding to directly order a modification of the State Department's decision,⁶²⁵ the court realized that some remedy was necessary for this governmental obstruction of the accused's efforts to secure defense evidence. Thus, the court, resting on fifth amendment due process grounds as well as sixth amendment right to counsel and compulsory process rationales, held that the government had the choice of either validating defense counsel's passport or discontinuing the prosecution. Specifically, the court said:

The United States has commenced and is prosecuting this criminal proceeding against the defendants. The indictment charges in many counts, false statements made and circulated by defendants with intent to hinder and obstruct the armed forces of the United States. The defendants have the constitutional right to present evidence that the statements alleged to have been made and circulated were not false and not published or circulated with criminal intent. This evidence lies abroad in Red China and North Korea.

They can, at least, have the opportunity to try to obtain this evidence, if the United States issues a passport to attorney Wirin valid for travel to and in Red China and North Korea. Without it, the rights granted by the Constitution become meaningless.

So the United States has its choice. It can choose to adhere to its policy of non-issuance of such passports.

⁶²⁵*Id.* at 528.

Or it can decide that it is more important to prosecute this criminal case. If the former be its choice, it will mean a discontinuance of the present prosecution.⁶²⁶

Thus, the court held that the government could not enforce its diplomatic policies *at the expense of the accused's right to present a defense* but must either facilitate and cooperate with the accused's efforts to secure defense witnesses or dismiss the prosecution.⁶²⁷

A related problem is posed in the so-called "lost evidence" cases. These cases involve situations in which the government has been in possession of physical evidence, such as bullets, weapons, drugs, blood samples, or written statements, which are arguably material to the defense and is unable or unwilling to produce the evidence at trial. This problem has arisen often in connection with statements required to be produced under the Jencks Act,⁶²⁸ and the courts have held that failure to produce the evidence requires dismissal of the prosecution in order to protect the accused's right to defend.⁶²⁹ In other contexts the courts have also dismissed prosecutions or reversed convictions because of the prosecution's failure or inability to supply arguably exculpatory evidence previously in its possession.⁶³⁰ In these cases the courts appear to be safeguarding the accused's right to defend by presuming that the lost or destroyed evidence would be exculpatory and therefore vital to the accused. Since the evidence is unavailable, its importance to the accused is not easily determined on a case-by-case basis. Because the prosecution's negligence or deliberate act is seemingly responsible for its loss, presuming the lost evidence to be exculpatory is certainly a rea-

⁶²⁶*Id.* at 530.

⁶²⁷The office of the Clerk of the United States District Court for the Northern District of California advised the author by telephone that the *Powell* prosecutions were dismissed on government motion by order dated May 2, 1961.

⁶²⁸18 U.S.C. § 3500 (1970).

⁶²⁹*United States v. Perry*, 471 F.2d 1057, 1063 (D.C. Cir. 1972) (dictum); cf. *United States v. Bryant*, 439 F.2d 642, 653 (D.C. Cir. 1971) (suggesting that dismissal is an appropriate sanction where the prosecutor in bad faith lost or destroyed the evidence).

⁶³⁰See, e.g., *United States v. Heath*, 147 F. Supp. 877 (D. Hawaii 1957), *appeal dismissed*, 260 F.2d 623 (9th Cir. 1958) (failure to supply lost personal tax records in a tax case); *Johnson v. State*, 249 So. 2d 470 (Fla. Ct. App. 1971), *appeal dismissed*, 280 So. 2d 673 (Fla. 1973) (failure to produce a fatal bullet necessary to cross-examine the prosecution's ballistics expert denied the accused the right to confrontation). But see *United States v. Love*, 482 F.2d 213 (5th Cir. 1973); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971); *People v. Eddington*, 53 Mich. App. 200, 218 N.W.2d 831 (1974) (nonproduction of glass samples tying the accused to the murder scene violated neither the confrontation nor compulsory process guarantees).

sonable approach to resolving the problem. Thus, the government cannot constitutionally act in such a way as to physically deprive the accused of evidence which is arguably material to the defense case.

3. Prosecutorial or Judicial Actions Which Discourage Defense Witnesses from Testifying.—As has already been discussed in conjunction with *Webb v. Texas*,⁶³¹ judicial admonitions, threats of perjury, or contempt citations which discourage defense witnesses from testifying clearly deny the accused the right to present a defense.⁶³² Although the *Webb* case dealt only with judicial admonitions which effectively discouraged defense witnesses from testifying, other cases hold that prosecutorial efforts to harass or discourage defense witnesses also constitute a denial of the right to present a defense.⁶³³ Such prosecutorial efforts have been known to include not only perjury admonitions⁶³⁴ but also direct threats of prosecution or arrest for testifying for the defense.⁶³⁵ Of course, the right guaranteed the accused is not violated merely because the court or the prosecutor has interjected a single discouraging comment. The cases properly suggest that the accused must demonstrate that he was in fact denied the witness' testimony or that the witness changed his testimony as a result of harassment or discouragement.⁶³⁶

⁶³¹409 U.S. 95 (1972). See notes 337-41 and accompanying text *supra*.

⁶³²*Webb v. Texas*, 409 U.S. 95 (1972).

⁶³³But see *United States v. Zane*, 495 F.2d 683, 698-99 (2d Cir. 1974); *United States v. Sclafani*, 487 F.2d 245 (2d Cir. 1973) (holding that a constitutional deprivation will not be found in pretrial remarks unless the accused subpoenas the witness and attempts to elicit the desired testimony in order to demonstrate that the remarks in fact discouraged the witness from testifying). *Contra*, *State v. Jamison*, 64 N.J. 363, 368, 316 A.2d 439, 444 (1974).

⁶³⁴See, e.g., *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973); *People v. Pena*, 383 Mich. 402, 175 N.W.2d 767 (1970).

⁶³⁵See, e.g., *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973); *Commonwealth v. Jennings*, 225 Pa. Super. 489, 311 A.2d 720 (1973).

⁶³⁶See, e.g., *United States v. Zane*, 495 F.2d 683, 698-99 (2d Cir. 1974); *United States v. Sclafani*, 487 F.2d 245 (2d Cir. 1973); *Watson v. State*, 513 S.W.2d 577 (Tex. Crim. App. 1974); *White v. State*, 517 S.W.2d 543, 549-51 (Tex. Crim. App. 1974) (on rehearing); cf. *Griffin v. Weinberger*, 492 F.2d 969, 970, (5th Cir. 1974). But see *People v. Pena*, 383 Mich. 402, 175 N.W.2d 767 (1970) (holding that where the prosecutor has engaged in an effort to discourage alibi witnesses by threats of perjury prosecutions the court must make an inquiry regarding the effect of the threats even though the alibi witnesses apparently testified for the accused); *State v. Kearney*, 11 Wash. App. 394, 523 P.2d 443 (1974) (prosecutor's advising defense character witnesses that the accused had refused a lie detector test undermined witnesses' confidence in the accused).

*State v. Jamison*⁶³⁷ was a particularly interesting case of this type. As a result of the trial judge's persistent efforts to advise a defense witness of his privilege against self-incrimination and to protect his fifth amendment rights, the accused in *Jamison* lost the testimony of an important defense witness. The witness had previously told the police that the accused had committed the crime. However, the witness then approached the prosecutor and defense attorney during a recess at the trial and said that he did not want to see the accused blamed for a crime which he, the witness, had committed. The attorneys thereupon informed the witness of his *Miranda* rights, and the witness still said he desired to take the blame. Accordingly, the attorneys took the witness before the trial judge, at which time the witness reaffirmed his prior statement and further stated, after another reminder of his constitutional rights, that he wished to plead guilty to the crime for which the accused was charged. Nevertheless, the court advised the accused that he could and probably would receive 21 years for the offense and appointed independent counsel for the witness. After consulting with counsel, the witness, *through his attorney*, retracted the confession and refused to testify at a preliminary *voir dire* inquiry on fifth amendment grounds. Relying on *Chambers v. Mississippi*,⁶³⁸ the New Jersey Supreme Court reversed the conviction and held that the judge's overzealous efforts to protect a previously willing witness' fifth amendment rights had denied the accused the right to present a defense.⁶³⁹ Specifically, the New Jersey Supreme Court took issue with the trial judge's decision to appoint counsel for the witness and to permit that counsel to invoke the fifth amendment for his client rather than requiring the client to invoke the privilege himself. Stressing that the witness had been a cooperative and willing witness and confessor to the crime, even after having been warned of his rights and the potential sentence he faced, the New Jersey Supreme Court held that the trial court's extraordinary efforts were not only unnecessary to protect the witness' fifth amendment rights but also effectively deprived the accused of the right to present a defense because the court's efforts effectively discouraged this otherwise willing witness from testifying.

A related problem of possible harassment or discouragement of defense witnesses occurs when the police or prosecutor advise a potential defense witness during the investigatory stages not to speak to the accused or his counsel. Obviously, where the prosecutor is the source of such advice, a significant breach of

⁶³⁷64 N.J. 363, 316 A.2d 439 (1974).

⁶³⁸410 U.S. 284 (1973).

⁶³⁹See also *State v. Jennings*, 126 N.J. Super. 70, 312 A.2d 864, cert. denied, 60 N.J. 512, 291 A.2d 374 (1972).

legal ethics may be involved,⁶⁴⁰ and the cases generally hold that such advice by the prosecutor obstructs the right to defend and requires reversal. In *Gregory v. United States*,⁶⁴¹ for example, the court reversed a conviction because the prosecutor advised certain witnesses to the crime not to speak with defense counsel unless the prosecutor was present, thereby resulting in the refusal of several eyewitnesses to speak with the accused's attorney.⁶⁴² The court said:

Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have.⁶⁴³

Thus, prosecutorial efforts to obstruct the accused's pretrial access to witnesses and evidence also pose significant right to defend issues.⁶⁴⁴

4. *Trial Scheduling and the Right To Defend.*—The scheduling of criminal trials can significantly affect the accused's ability to defend. Without adequate time to prepare, the accused obviously cannot fully exercise the right to present a defense. Similarly, if the trial is scheduled when a vital defense witness will be unavailable because of illness or travel, the right to defend may be violated. Thus, the right to present a defense in some cases adds a constitutional dimension to decisions regarding the setting of trial dates, continuances, and recesses during trial.⁶⁴⁵

⁶⁴⁰Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rules 7-109(A) & (B). See also *id.* Disciplinary Rule 7-103; Ethical Consideration 7-27.

⁶⁴¹369 F.2d 185 (D.C. Cir. 1966).

⁶⁴²*Id.* at 187-89. See also *United States v. Matlock*, 491 F.2d 504, 506 (7th Cir. 1974).

⁶⁴³369 F.2d at 188.

⁶⁴⁴It should be noted that a number of cases permit the prosecution to advise witnesses of their right to decline to be interviewed. See, e.g., *United States v. Matlock*, 491 F.2d 504, 506 (7th Cir. 1971); *United States v. White*, 454 F.2d 435, 438-39 (7th Cir. 1971). While these cases find no constitutional violation, they do not suggest that such an instruction would never violate the right to defend. In *White* and *Matlock*, for example, the record indicated no actual denial of access to the witnesses or refusal on their part to talk to defense counsel, unlike *Gregory*. Where such obstruction actually occurs, especially if caused by the witness' understanding of the prosecutor's admonition, a significant right to defend issue would be presented.

⁶⁴⁵See, e.g., *Jarvis v. State*, 220 Ala. 501, 126 So. 127 (1930); *Carter v. State*, 196 Ark. 746, 119 S.W.2d 913 (1938); *People v. Foy*, 32 N.Y.2d 473, 299 N.E.2d 664, 346 N.Y.S.2d 245 (1973).

Problems of lack of pretrial preparation time have generally been analyzed under the rubric of the sixth amendment right to counsel.⁶⁴⁶ This reliance on the right to counsel as the vehicle for analyzing problems fundamentally involving the right to prepare a defense appears to be a surviving relic of the pre-incorporation era when many due process problems, including many right to defend issues, were analyzed under the right to counsel umbrella.⁶⁴⁷ One of the problems with relying on the right to counsel is that such reliance often foists upon the accused the rather heavy burden of proving that defense counsel was ineffective under the rigorous tests which courts usually apply to such claims.⁶⁴⁸ Furthermore, while the failure to provide sufficient time to prepare a defense is generally the result of a judicial decision, analyzing the problem as an ineffective assistance of counsel claim is often incorrectly perceived by the court as an attack on defense counsel's competence, and consequently places emotional overtones on the decision.⁶⁴⁹ The right to defend balancing test certainly provides a more convenient and clearer method of analyzing such problems. It frees such cases from the unnecessary emotional overtones inherent in an ineffective assistance of counsel claim and permits a more balanced and flexible approach to the issues.

The cases have generally analyzed time scheduling problems on right to defend or compulsory process grounds only in situations in which the accused claims that the denial of a pretrial continuance or adjournment during trial prevented important defense witnesses from testifying.⁶⁵⁰ The New York Court of Appeals, for example, recently held in *People v. Foy*⁶⁵¹ that the

⁶⁴⁶See, e.g., *Hawk v. Olson*, 326 U.S. 271 (1945); *Avery v. Alabama*, 308 U.S. 444 (1940); *Fields v. Peyton*, 375 F.2d 624 (4th Cir. 1967); *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3rd Cir. 1961); *United States v. Helwig*, 159 F.2d 616 (3d Cir. 1947); *United States ex rel. Kelley v. Rundle*, 242 F. Supp. 708 (E.D. Pa. 1965); *United States v. Vasilick*, 206 F. Supp. 195 (M.D. Pa. 1962).

⁶⁴⁷See, e.g., *Gibbs v. Burke*, 337 U.S. 773 (1949); *Powell v. Alabama*, 287 U.S. 45 (1932), discussed at notes 214-17 *supra* and accompanying text.

⁶⁴⁸Cf. *Wycoff v. State*, 226 N.W.2d 29 (Iowa 1975). It should be noted that the author was one of the unsuccessful counsel for the appellant in the *Wycoff* case and obviously disagrees with the result reached by the Iowa Supreme Court therein.

⁶⁴⁹*Id.*

⁶⁵⁰See, e.g., *Paoni v. United States*, 281 F. 801 (3d Cir. 1922); *People v. Foy*, 32 N.Y.2d 473, 299 N.E.2d 664, 346 N.Y.S.2d 245 (1973); *People v. Sweeney*, 43 App. Div. 2d 564, 349 N.Y.S.2d 63 (1973); cf. *United States v. Sanchez*, 459 F.2d 100 (2d Cir. 1972); *Jarvis v. State*, 220 Ala. 501, 126 So. 127 (1950); *Carter v. State*, 196 Ark. 746, 119 S.W.2d 913 (1938).

⁶⁵¹32 N.Y.2d 473, 299 N.E.2d 664, 346 N.Y.S.2d 245 (1973).

right to defend may at times require continuances or adjournments in order to facilitate the accused's ability to call a known witness:

[A]s the United States Supreme Court has recently observed: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed. 2d 297, 312).

This is not to suggest a mechanical rule requiring the court to grant an adjournment to allow the defendant to endlessly pursue an elusive witness whose name and address are unknown, and whose existence depends on rumor or surmise. . . . Nor should the court be required to permit the prosecution to lapse pending the return of a witness from a foreign jurisdiction, or a fugitive hide-a-way. . . .

But when the witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied merely because of possible inconvenience to the court or others. This is especially true when, as in the case at bar, denial of the motion would not only deprive the defendant of the fundamental right to present witnesses in his defense, but would in fact effectively deprive him of the defense itself and cast doubt upon his credibility.⁶⁵²

Thus, the New York Court of Appeals seems to have suggested the right to defend balancing test as a vehicle for deciding such trial scheduling problems. The importance of the witness to the defense, discounted by any lack of identification, residence outside the jurisdiction, or other continuing source of unavailability, must be weighed against the governmental and societal interest in a speedy and efficient disposition of the case. If the witness is known and important to the accused, but only temporarily unavailable for a short period, continuances should be granted in order to protect the accused's right to present a defense. On the other hand, the case becomes less compelling if the identity or location of the witness is unknown, the witness' value to the defense is speculative, or the witness will remain unavailable for a substantial period of time.

D. The Right To Appear Pro Se: The Right To Defend and Its Relationship to Appointment of Counsel

The Supreme Court's decision in *Faretta v. California*,⁶⁵³ up-

⁶⁵²*Id.* at 478, 299 N.E.2d at 667 346 N.Y.S.2d at 249.

⁶⁵³422 U.S. 806 (1975).

holding the right of the accused to knowingly waive counsel and appear *pro se*, raises right to defend questions in the context of appointment of counsel. As has already been discussed, early English common law relied almost exclusively on the accused, only sometimes represented by counsel, to present the defense. The accused freely addressed the court and jurors and explained in an unsworn statement his side of the case.⁶⁵⁴ Yet the same procedural rigidification which has created many of the obstacles to the right to defend also has severely restricted the accused's participation in the modern trial process.⁶⁵⁵ Today the accused's only role at trial is generally that of a witness for the defense and that role is hampered by evidentiary rules which discourage the accused from testifying.⁶⁵⁶ As already noted, the modern constriction of the defendant's participation in the trial is primarily the result of the testimonial enfranchisement of the accused during the late nineteenth century and the expansion of the availability of counsel in the nineteenth and twentieth centuries.⁶⁵⁷

Prior to *Faretta*, the question of whether the criminally accused had the right to waive counsel and present the defense *pro se* had been the subject of a significant debate.⁶⁵⁸ An accused may desire to forego counsel's assistance for various reasons. Some defendants may have political motivations for seeking to represent themselves, while others may simply be suspicious and distrustful of court-appointed counsel or public defenders and feel they will be better represented if they proceed *pro se*.⁶⁵⁹ An accused may desire to appear *pro se* in order to give the jury a more complete view of himself as a person in the hope of creating a favorable impression which the strictures of the witness stand might not easily permit.⁶⁶⁰ Similarly, the accused may desire to address the jury but may be reluctant to take the witness stand and be cross-examined due to a prior criminal record⁶⁶¹ or a prior illegally-obtained confession⁶⁶² which could be used to impeach his testimony. Thus, unless the jurisdiction permits the accused to make an unsworn statement to the jury free from cross-

⁶⁵⁴See notes 20-23 *supra* and accompanying text.

⁶⁵⁵See notes 137-51 *supra* and accompanying text.

⁶⁵⁶See notes 661-62 *infra* and accompanying text.

⁶⁵⁷See notes 137-51 *supra* and accompanying text.

⁶⁵⁸Compare *People v. Sharp*, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972), with *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). See generally Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971).

⁶⁵⁹See Comment, *supra* note 658, at 1498-1507.

⁶⁶⁰See *id.* at 1504-05.

⁶⁶¹Cf. *State v. Hurt*, 49 N.J. 114, 228 A.2d 673 (1967); *Sullivan v. State*, 333 P.2d 591 (Okla. Crim. App. 1958).

⁶⁶²Cf. *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

examination,⁶⁶³ the defendant must represent himself *pro se* in order to address the jury without being subjected to cross-examination.

A number of jurisdictions protect the right of the accused to appear *pro se* in criminal cases, either by state constitutional guarantee⁶⁶⁴ or by statute. However, in those jurisdictions which do not protect the right to appear *pro se*,⁶⁶⁵ a significant issue arose as to whether the Federal Constitution guarantees the right. The *Fareta* decision resolved the issue by constitutionalizing the right to appear *pro se* under the rubric of the sixth amendment right to counsel. The Court also simultaneously made its decision applicable to the states through the fourteenth amendment.

In his opinion for the Court in *Fareta*, Justice Stewart relied primarily on history and dicta in prior decisions of the Court⁶⁶⁶ to support his conclusion that the sixth amendment protects the right to defend *pro se*. Reviewing much of the history discussed in section I of this Article, Justice Stewart arrived at the perfectly correct conclusion that "[t]he right to counsel was clearly thought to supplement the primary right of the accused to defend himself, utilizing his personal rights to notice, confrontation and compulsory process."⁶⁶⁷ Justice Stewart's position appears to cap-

⁶⁶³Cf. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

⁶⁶⁴*United States v. Dougherty*, 473 F.2d 1113, 1123 n.11 (D.C. Cir. 1972).

⁶⁶⁵See, e.g., *People v. Sharp*, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).

⁶⁶⁶See, e.g., *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). Compare *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *United States v. Pike*, 439 F.2d 695 (9th Cir. 1971); *United States v. Warner*, 428 F.2d 730, 733 (8th Cir. 1970) (dictum); *Lowe v. United States*, 418 F.2d 100 (7th Cir. 1969); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969) (dictum); *Arnold v. United States*, 414 F.2d 1056, 1058-59 (9th Cir. 1969) (dictum); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15-16 (2d Cir. 1965); *United States ex rel. Robinson v. Fay*, 348 F.2d 705, 707 (2d Cir. 1965) (dictum); *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965); and *United States v. Plattner*, 330 F.2d 271 (1964), with *Butler v. United States*, 317 F.2d 249, 258 (8th Cir. 1963); *Manson v. Pitchess*, 317 F. Supp. 816, 821-24 (C.D. Cal. 1970); and *People v. Sharp*, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972) (pre-*Fareta* cases on the right to defend *pro se*).

⁶⁶⁷422 U.S. at 829-30 (footnote omitted). Justice Stewart also stated: Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the

ture the argument, made at the outset of this Article, that the sixth amendment counsel guarantee, and indeed most of the fifth and sixth amendment guarantees for the accused, were intended to cure perceived deficiencies in then extant criminal procedure inherited from English common law. The problem with Justice Stewart's argument, however, is that it is difficult to logically perceive that the adoption of this sixth amendment guarantee of the right to the assistance of counsel, which the Court accurately described as a supplementary or remedial guarantee, also itself protected the then extant right of the accused to defend by himself. If the right to appear *pro se* is constitutionally protected, the protection seems to emerge from the spirit of the Bill of Rights as a whole, rather than from the express guarantee contained in the sixth amendment.⁶⁶⁸

The penumbral view of the right to defend⁶⁶⁹ suggests that the origins of the right to appear *pro se* might more logically be grounded on the right to defend. Since the Framers of the Bill of Rights attempted to eliminate all or most of the then extant obstacles to the accused's ability to defend, they surely also intended to protect usages of the day which *already* guaranteed the accused the right to present a defense. Among those practices was, of course, the right to appear *pro se*.⁶⁷⁰ Thus, since the right to appear *pro se* may for very important strategic considerations significantly further the accused's right to present a defense, the constitutional origins and analysis of this guarantee should rest upon the right to defend. And, of course, the flexible balancing test of the right to defend may facilitate the resolution of difficult cases involving persons of low intelligence or questionable mental competency who claim the right to defend *pro se* better than reliance on the sixth amendment right to counsel.

The *Faretta* decision and its analysis obviously have effects which spill over into other areas relating to the relationship of the right to defend and the right to counsel. The Second Circuit, for example, has recently recognized that "the right to manage

Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820 (emphasis supplied and footnote omitted).

⁶⁶⁸However, in placing reliance on the sixth amendment's guarantee of counsel, the Court was merely continuing the pre-*Webb* and *Chambers* trend to strain the language of the specific guarantees of the fifth and sixth amendments in order to further the right to defend.

⁶⁶⁹See notes 387-88 *supra* and accompanying text.

⁶⁷⁰Cf. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), which guaranteed the right of parties to "plead and manage their own causes personally" in federal courts. That portion of the original Judiciary Act of 1789 is now codified in 28 U.S.C. § 1654 (1970).

one's own defense," which the court saw as the heart of *Faretta*, guarantees the accused the right to have retained counsel of his own choosing, even though that counsel may have a significant conflict of interest.⁶⁷¹ Thus, *Faretta*, while formally predicated on a sixth amendment right to counsel analysis, opens up a host of questions about the accused's right to control the presentation of the defense case.

E. The Right To Defend in Other Contexts

Many other procedural problems may be posed during the criminal trial which affect the accused's opportunity to present a defense. The Supreme Court cases suggest other areas in which the right to defend could be important—for example, jury instructions,⁶⁷² the "voucher" rule,⁶⁷³ order of proof,⁶⁷⁴ and closing arguments.⁶⁷⁵

Some commentators have suggested that right to defend issues may arise in the context of decisions regarding joinder or the order in which alleged coprincipals are tried.⁶⁷⁶ The United States Supreme Court has already considered and resolved the

⁶⁷¹United States v. Armeda-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

⁶⁷²See *Cool v. United States*, 400 U.S. 100 (1972), discussed at notes 342-50 *supra* and accompanying text (jury instructions placing onus on defense witnesses may violate the right to defend and due process clause by lessening the prosecution's burden below the constitutionally required "beyond a reasonable doubt" standard).

⁶⁷³See *Chambers v. Mississippi*, 410 U.S. 284 (1973), discussed at notes 351-76 *supra* and accompanying text (strict adherence to the traditional "voucher" rule may obstruct the accused's efforts to present a defense, and therefore may raise constitutional issues); cf. *United States v. Booker*, 480 F.2d 1310, 1311 (7th Cir. 1973).

⁶⁷⁴See *Brooks v. Tennessee*, 406 U.S. 605 (1972), discussed at notes 309-32 *supra* and accompanying text (rulings regarding order of proof acquire a constitutional dimension when they result in the exclusion of portions of the defense case or obstruction of its presentation). See also *United States v. Black*, 480 F.2d 504 (6th Cir. 1973) (*Brooks* held to have no retroactive effect).

⁶⁷⁵See *Herring v. New York*, 422 U.S. 853 (1975). The Court held unconstitutional a New York statute giving the trial court discretion in a non-jury criminal trial to deny the defense the right to a closing argument. The basis of the decision was the right to counsel. *Id.* at 865. As in *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court's adherence to a specific right to counsel guarantee in *Herring* considerably strained the language of the sixth amendment. See notes 308-32 *supra* and accompanying text. The flexible analysis of the right to defend test would have been more appropriate. Cf. 422 U.S. at 865-66 (Rehnquist, J., dissenting). A close reading of Justice Stewart's opinion in *Herring* indicates that the Court is beginning to recognize that its decisions are constitutionalizing the assurance of an "adversary fact finding process in a criminal trial," *id.* at 858, and thereby necessarily guaranteeing the right to present a defense.

⁶⁷⁶See Westen *supra* note 114, at 141-46, for an excellent discussion of the joinder and trust order problems.

problem of prejudicial joinder which results in incriminating statements of codefendants being used *against* the accused.⁶⁷⁷ However, in many instances joinder may prevent the accused from presenting favorable evidence either because a potential witness is unwilling to testify at a joint trial,⁶⁷⁸ a codefendant refuses to testify,⁶⁷⁹ or because exculpatory material is excluded due to its prejudice to codefendants.⁶⁸⁰ Similarly, the order in which codefendants are tried in separate trials or the order in which separate but related civil and criminal cases are heard⁶⁸¹ may pose right to defend issues. Right to defend issues, thus, can arise in innumerable procedural contexts.

VII. CONCLUSION

The right to defend requires a constitutional analysis of any problem involving the application of a procedural or evidentiary rule in such a manner as to hinder, obstruct, or prevent the accused from presenting defense evidence relating to the issues of guilt or affirmative defenses. The constitutional level of analysis provided by the right to defend requires trial courts in analyzing such problems to consider the fairness to the accused of applying the procedural rule in question, while still permitting an accommodation of the procedural and evidentiary interests furthered by the rule at issue. In short, the right to present a defense seeks to guarantee, consistent with the adversary system, the accused's opportunity to fully participate in the search for truth at the criminal trial.

In recent years the Supreme Court has shown an increased reliance on the Constitution to assure that the criminal trial remains an adversarial search for truth. Thus, the present members of the Supreme Court have deemphasized the constitutional guarantees which seek to further certain procedural interests unrelated to the search for truth, while insisting that those guarantees which

⁶⁷⁷See *Bruton v. United States*, 391 U.S. 123 (1968).

⁶⁷⁸See, e.g., *Talavera v. State*, 243 So. 2d 595 (Fla. 1971); *People v. Owens*, 22 N.Y.2d 93, 97-98, 238 N.E.2d 715, 718, 291 N.Y.S.2d 313, 316-17 (1968); cf. *People v. Isenor*, 17 Cal. App. 3d 324, 334-36, 94 Cal. Rptr. 746, 753-55 (1971) (finding no compulsory process violation in denial of severance motion).

⁶⁷⁹See, e.g., *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971); *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962).

⁶⁸⁰See, e.g., *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

⁶⁸¹See, e.g., *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965); *United States v. Sanders*, 266 F. Supp. 615 (W.D. La. 1967); cf. *Feehery v. State*, 480 S.W.2d 649 (Tex. Crim. App. 1972) (evidence sought not very important to the accused).

safeguard the accuracy of the guilt determination process deserve special protection.⁶⁸²

Obviously, the right to present a defense lies at the core of the guilt determination process. The Supreme Court has compiled an impressive record in recent years of consistently protecting the right to defend. Although the rationales advanced by the Court for its decisions were not always predicated on right to defend reasoning because of the Court's overzealous reliance on the incorporation doctrine, the Court's steadfast commitment to protecting the right to defend cannot be ignored. While the Court moved in *Chambers v. Mississippi*⁶⁸³ toward explicit adoption of the right to defend as a separate constitutional doctrine, it has not yet mapped out the constitutional test applicable to such cases. The case-by-case balancing test discussed in this Article appears consistent with the Court's present desire to resolve issues of criminal procedure on a case-by-case analysis, rather than by the adoption of rigid rules.⁶⁸⁴ And, of course, in resting the right to defend on penumbral or due process grounds, the Court can avoid the strain which the incorporation doctrine approach has at times placed on the language and intent of the specific guarantees of the fifth and sixth amendments.⁶⁸⁵ Since the Supreme Court has shown a recent willingness to abandon the incorporation doctrine as the sole method of analyzing the scope of the fourteenth amendment due process clause, the right to defend provides a needed alternative means for analyzing many constitutional problems of criminal procedure.

⁶⁸²See, e.g., *United States v. Kordel*, 397 U.S. 1, 8-9 (1970); *Flint v. Mullen*, 499 F.2d 100, 105-06 (1st Cir. 1974) (Coffin, J., dissenting).

⁶⁸³410 U.S. 218 (1973).

⁶⁸⁴Compare *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), with *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Brooks v. Tennessee*, 406 U.S. 605 (1972).

⁶⁸⁵See, e.g., *Brooks v. Tennessee*, 406 U.S. 605 (1972).

Notes

Inverse Condemnation and the Right of Access of Abutting Property Owners

I. INTRODUCTION

The theory of inverse condemnation provides a remedy where the state takes or injures property of another or takes or injures rights which accrue to property without compensation.¹ The remedy of inverse condemnation is procedurally similar to an action of eminent domain.² However, in an inverse condemnation suit, the positions of the respective parties are reversed; the property owner is the plaintiff, and the governmental entity is the defendant.³ While a court action precedes the taking in eminent domain, the damages or taking in inverse condemnation occur before the commencement of a court action.⁴ The actions are otherwise similar. Valuation of the injury or taking in inverse condemnation and eminent domain is as of the date of the taking

¹U. S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation.")

"It is now well settled law in . . . the United States that when private property is taken by eminent domain, the owner of the property is constitutionally entitled to compensation." 3 NICHOLS ON EMINENT DOMAIN § 8.1(2), at 6 (3d ed. J. Sackman & R. Van Brunt 1975) [hereinafter cited as NICHOLS], citing *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1934); *United Ry. & Elec. Co. v. West*, 280 U.S. 234 (1929); *Phelps v. United States*, 274 U.S. 341 (1927). See also *State v. Reid*, 204 Ind. 631, 185 N.E. 449 (1933); *General Outdoor Advertisement Co. v. City of Indianapolis*, 202 Ind. 85, 157 N.E. 309 (1930) (removal of billboard was not a nuisance per se and compensation must be paid).

²Under the theory of eminent domain, the sovereign has the right, acting in the public interest, to force the owner of property to sell the same to the public. Kucera, *Eminent Domain Versus Police Power—A Common Misconception*, 1959 INSTITUTE ON EMINENT DOMAIN 21. Since eminent domain is an inherent power of the sovereign, the sovereign may grant it to whomsoever it may think proper, including public service corporations. IND. CODE § 32-11-3-1 (Burns 1973).

³Arnebergh, *Recent Developments in the Law of Inverse Condemnation*, 1974 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 319 (1974).

⁴*Id.*

or injury.⁵ Compensation in both inverse condemnation and eminent domain is monetary damages.⁶

The inverse condemnation theory traditionally applied only in cases involving a direct taking.⁷ This theory developed into an application to the taking of rights to property and, in more recent years, continued to expand into other areas not involved with the actual taking of land.⁸ The principal application of this

⁵6 NICHOLS § 25.41(2), at 25-22 to 25-24.

⁶"Compensation as used in the constitutional provision as a limitation upon the power of eminent domain implies a full and complete equivalent, usually monetary, for the loss sustained by the owner whose land has been taken or damaged." 3 NICHOLS § 8.6, at 43, *citing* United States v. Miller, 317 U.S. 369, 373 (1943); United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1938).

⁷In its early stages, inverse condemnation, or reverse condemnation as it is often termed, was frequently characterized as a "de facto" or "common law" taking. 6 NICHOLS § 25.41(2), at 25-22. The reason for this characterization was the self-executing character of the constitutional provisions which gave rise to this type of action. *Id.*; 3 *id.* § 8.1(2), at 11. This traditional view of inverse condemnation required a "physical entry"; however, the modern trend is to relax this prerequisite. 29A C.J.S. *Eminent Domain* § 110, at 442 n.22 (1965) (there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking).

⁸Inverse condemnation of airspace.—the taking of airspace of super-adjacent landowners—and application of inverse condemnation had its beginnings in 1946. In *Causby v. United States*, 328 U.S. 256 (1946), the United States Supreme Court recognized that invasion of airspace was in the same category as invasion of the surface. The Court blended trespass and nuisance doctrines and applied them via the inverse condemnation theory. In *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962), the Court reinforced the *Causby* decision and took the position that the governmental airport authority was liable for damages and not the owners of the aircraft. As a limitation upon inverse condemnation of airspace, most courts have insisted that there be an actual physical trespass before damages can be awarded.

In *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965), the Supreme Court held that the decision of the Indiana Supreme Court in *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963) that special zoning of property adjacent to airports under the guise of police power was a taking of rights under the state constitution and that the owners must therefore be compensated, rested upon adequate state grounds and therefore the Court was deprived of jurisdiction to review the judgment. See Russell, *Recent Developments in Inverse Condemnation of Airspace*, 39 J. AIR L. & COM. 81, 97-98 (1973). See generally Arnebergh, *supra* note 3; Neal, *Airspace—Air Easements*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 309 (1975); Sackman, *Air Rights—A Developing Prospect*, NINTH INSTITUTE ON EMINENT DOMAIN 1 (1969); Kline, *The SST and Inverse Condemnation*, 15 VILL. L. REV. 887 (1970); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); *Inverse Condemnation* 40 J. AIR. L. & COM. 332-41 (1974).

Inverse condemnation of personal property.—the United States Supreme

theory is to rights of adjacent property owners, often referred to as the area of "abutter's rights."¹⁰ This Note will focus upon the adjacent property owner's right of access to adjoining highways. For this purpose, an "abutter" is an owner of land which adjoins either an existing highway or land taken for highway purposes. Depending upon many variables, such an abutter may have many rights or easements which grow out of the abutting relationship. Most authorities are in agreement that rights of an abutter generally include, but are not limited to, those of access, light and air, view, and lateral support.¹¹ These rights, along with whatever other rights which may exist in the particular jurisdiction, may be divided into two general areas: those rights which the abutter shares with the public in general, and those rights which are special and peculiar to the abutter's particular parcel of property.¹²

II. GENERAL CONCEPTS

A. State Constitutional Provisions: *Taking vs. Damaging*

State constitutional provisions pertaining to compensation in eminent domain actions are the starting point for an understanding of inverse condemnation theory. These constitutional provisions

Court held in *Armstrong v. United States*, 364 U.S. 40 (1960), that the fifth amendment of the Constitution protects both real and personal property. In *Armstrong*, the Court found that the taking of a ship under construction on which there were materialmen's liens deprived the lienholders of compensable property, and they were entitled to recovery based upon the taking of personal property. Arnebergh, *supra* note 3, at 325.

A very unique but unsuccessful attempt to apply inverse condemnation may be found in *Leger v. Louisiana Dept. of Wildlife & Fisheries*, 306 So. 2d 391 (La. Ct. App. 1975). The plaintiff in *Leger* was a farmer who had suffered the loss of a crop of sweet potatoes due to wild deer. In his unsuccessful suit against the state, the plaintiff alleged that the deer, property of the state, had entered his land and taken, without compensation, rights existing upon it.

¹⁰The reasons for applying the doctrine of inverse condemnation to the rights of adjacent property owners are: the damage to property, if reasonably foreseeable, would normally entitle owners to compensation; property owners do incur direct damages to their property; public works will not be stifled because of liability for direct damages to property; the cost of such damages to property are better absorbed by the taxpaying public; and, if the owners of damaged property are left uncompensated, they would be contributing more than their share to public undertakings. Arnebergh, *supra* note 3, at 322. See also *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

¹¹2 NICHOLS § 5.72(1), at 5-154 to -155.

¹²Sackman, *Access—A Problem in Liability*, FOURTH ANNUAL INSTITUTE ON EMINENT DOMAIN 1, 5 (1962).

are of two types:¹² those allowing compensation for a "taking" of property,¹³ and those allowing compensation for a "taking or damaging" of property.¹⁴

In states which have constitutional clauses providing for compensation for "taking or damaging," the courts are more likely to allow payment for mere injury to property.¹⁵ Such jurisdictions generally make no distinction between damages to remainders by partial taking and damages to abutting property owners.¹⁶ Other states, such as Indiana,¹⁷ with constitutional pro-

¹² NICHOLS § 6.1(3), at 6-19. See also Hannett, *Problems of Access in Eminent Domain*, NINTH INSTITUTE ON EMINENT DOMAIN 119, 123 (1969).

¹³ New York is a primary example of a state with a "taking" clause in its constitutional provision pertaining to eminent domain. N.Y. CONST. art. I, § 6. The leading case in New York is *Sauer v. City of New York*, 180 N.Y. 27, 72 N.E. 579 (1904), *aff'd*, 206 U.S. 536 (1907), in which the New York court held that a property owner with land abutting property taken in eminent domain had no easement of ingress and egress when such easement conflicted with the public's rights as to a highway; therefore the abutting property owner could not recover for a taking of such easement. See also *Bopp v. State*, 19 N.Y.2d 368, 280 N.Y.S.2d 135, 227 N.E.2d (1967); *Selig v. State*, 10 N.Y.2d 34, 217 N.Y.S.2d 33, 176 N.E.2d 59 (1961); *Northern Lights Shopping Center, Inc. v. State*, 20 App. Div. 2d 415, 247 N.Y.S.2d 333 (1964). In recent years the courts of New York have allowed recovery of damages where an abutting landowner is denied suitable access. See *Priestly v. State*, 23 N.Y.2d 152, 295 N.Y.S.2d 659, 242 N.E.2d 827 (1968); *County of Onondaga v. White*, 36 App. Div. 2d 439, 321 N.Y.S.2d 305 (1971); *Airport Lodge of Rochester, Inc. v. Brooks-Buell Inc.*, 323 N.Y.S.2d 894 (Sup. Ct. 1971) (discussion of application of damages). See also 2 NICHOLS § 6.1(3), at 6-19; 4A *id.* § 14.1(1), at 14-6; Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335, 350-62 (1974) (discussion of abutter's rights in New York).

¹⁴ The first state to adopt a "taking and damage" clause in its constitution was Illinois in 1870. ILL. CONST. art. I, § 13 (1870). The first application of the damage clause was in the landmark case of *Rigney v. City of Chicago*, 102 Ill. 64 (1882), which allowed inverse condemnation proceedings for the taking of incorporeal rights. See also *Chicago v. Taylor*, 125 U.S. 161 (1888); *Chapman v. Staunton*, 246 Ill. 394, 92 N.E. 905 (1910); *Shrader v. Cleveland Ry.*, 242 Ill. 227, 89 N.E. 997 (1909); *Aldrich v. Metropolitan W. Side Elevated R.R.*, 195 Ill. 456, 63 N.E. 155 (1902); *Chicago N. Shore St. Ry. v. Payne*, 192 Ill. 239, 61 N.E. 467 (1901); *Citizens Utilities Co. v. Metropolitan Sanitary Dist.*, 322 N.E.2d 857 (Ill. Ct. App. 1974); *Cuneo v. City of Chicago*, 292 Ill. App. 235, 11 N.E.2d 16 (1937) (diversion of business not compensable element of damages). See also Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335, 341 (1974).

¹⁵ Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335, 336 (1974).

¹⁶ Sackman, *supra* note 11, at 32-33.

¹⁷ IND. CONST. art. 1, § 21.

Compensation for services or property.—No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in

visions providing for compensation only for "taking," are more conservative in their awarding of damages to abutting property owners.¹⁸

Generally, under a constitutional provision providing compensation in the event of a "taking," the rights of an abutting owner are not considered to be of such an absolute character that he can resist or prevent any and all detrimental interference with the street.¹⁹ The abutter's rights will not prevent a municipality from controlling, regulating, or improving the street in the public interest, even though it appears that the privileges which the abutter previously had enjoyed and the benefits he had derived from the street in its existing condition will be curtailed or impaired by the proposed change.²⁰ However, under the constitutional provisions providing for compensation in the event of a "taking," a dichotomy exists between those rights an abutter shares with the public generally and those rights which accrue to him alone, since only the latter are considered "property."²¹ When such rights are considered "property" in the constitutional sense, they cannot be destroyed without compensation.²² In Indiana, an abutter generally may be allowed compensation when he has suffered an injury to a right in his land that is special and peculiar from the injury to the general public, or when the abutter has been denied "reasonable access."²³

Under the constitutional and statutory provisions for compensation in the event of "taking or damage," the abutter's rights are generally considered of such a nature as to be strictly pro-

case of the State, without such compensation first assessed and tendered.

¹⁸Although the Indiana Constitution provides for compensation only when there is a "taking" of property, most Indiana Code provisions pertaining to eminent domain allow compensation for damaging of property rights. See IND. CODE §§ 8-1-8-1, 8-3-5-1 (Burns 1973); *id.* § 8-3-12-4 (Burns Supp. 1974); *id.* §§ 8-3-13-2, 8-4-1-16, 8-11-1-1 to -11, 8-13-2-1 to -14, 8-15-2-7, 8-17-12-8 (Burns 1973); *id.* §§ 32-11-1-1 to -13, 32-11-2-1 to -6, 32-11-3-1 to -3, 32-11-4-1 to -5, 32-11-5-1 (Burns 1973).

¹⁹2A NICHOLS § 6.444(1), at 6-198.

²⁰*Id.*

²¹2 *id.* § 6.444(1), at 5-155 to -163.

²²In Indiana the abutter has several forms of relief. The Indiana Constitution affords an aggrieved property owner a common law suit against a governmental entity for a common law taking. IND. CONST. art. 1, § 21. Also statutory and case law in Indiana allow proceedings which may be referred to as an action in inverse condemnation for a non-physical taking. See *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964); IND. CODE § 32-11-1-12 (Burns 1973).

²³*State v. City of Terre Haute*, 250 Ind. 613, 238 N.E.2d 459 (1968).

tected.²⁴ In such cases, the abutting owner will be compensated whenever his rights are interfered with. The only difficulty is in distinguishing between rights of the public and the rights of the abutter in the street which are appurtenant to his abutting land. For example, the right to use the street as an avenue of travel, while it may be enjoyed by the abutting landowner more frequently than by other citizens, is nonetheless a public right.²⁵ Criteria for determining whether a right is public or private include the following: Whether the relative position of the abutter's land and the abutting way has been changed; whether the abutter has access to the way; whether the passage along the way has been obstructed in such a way as to seriously impair accessibility to the premises; whether the way is used for other than street purposes; and whether the light and air from the way has been materially obstructed.²⁶

B. Police Power: Its Effects on Inverse Condemnation Relating to Abutter's Rights

Eminent domain is not the only state power that directly affects property or property rights. Concurrent with a state's power of eminent domain is its police power. The concept of "police power" is one which has escaped a solid definition.²⁷ Gen-

²⁴2A NICHOLS § 6.4432(2), at 6-179 (to recover damages the claimant need not establish that the public work constitutes a nuisance or that the work was negligently accomplished).

²⁵*Id.* at 6-199.

²⁶*Id.* at 6-199 to -200.

²⁷The Supreme Court of the United States has recognized the difficulty in defining "police power." In *Berman v. Parker*, 348 U.S. 26, 32 (1954), the Court stated:

An attempt to define its [police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.

See also California State Ass'n v. Maloney, 341 U.S. 105, 110 (1961); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1948); *Olsen v. Nebraska*, 313 U.S. 236 (1940).

However, the Court has applied the familiar standard of reasonableness in assessing application of such power. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

The Court has also set somewhat nebulous criteria for determining whether police power is reasonable.

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interest of the public . . . require[s] such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

erally, police power is the sovereign's power to govern its members so as to secure and promote the public welfare.²⁸ This may be done by restraint and compulsion.²⁹ When police power is exercised upon property, it involves the "regulation" of such property to prevent its use in a manner that is detrimental to the public interest.³⁰ If the property owner suffers injury as a result of an exercise of the police power, the injury is said to be *damnum absque injuria*.³¹ The regulation of property must be fluid to meet the ever-changing and expanding demands of the public. The limitation placed upon police power is, therefore, the test of "reasonableness."³² When police power exceeds its limitation of reasonableness, the property owner may be entitled to compensation.³³ Unreasonableness may be presumed when the benefit to the public is negligible when compared with the detriment to the owner.³⁴

While both police power and eminent domain may involve property and property rights, they are conceptually different. When police power is exercised within the legitimate limit of reasonableness, no compensation is required.³⁵ Eminent domain on the other hand recognizes a right to compensation.³⁶ Confusion may result where police power, like eminent domain, is used to actually take property or property rights. When police power, within its regulatory function, is used to take property, the property or property right is destroyed.³⁷ When eminent domain is exercised to take property or property rights, such property or property rights are "used" by the public.³⁸ Many states have

²⁸1 NICHOLS § 1.42, at 1-105.

²⁹Kucera, *Eminent Domain Versus Police Power—A Common Misconception*, 1959 INSTITUTE ON EMINENT DOMAIN 1.

³⁰1 NICHOLS § 1.42, at 1-104.

³¹*Id.* at 1-109 (the abutter has suffered no injury because he is compensated for the damages by sharing in the general benefits to the public which the regulations are intended and calculated to secure). See also Sackman, *Access—A Reevaluation*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 335 (1974).

³²Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107, 116 (1971). See also 1 NICHOLS § 1.42(7), at 1-153 to -165; Kucera, *supra* note 29, at 4.

³³1 NICHOLS § 1.42(1), at 1-114 (actual appropriation of property for the public use is an act of eminent domain).

³⁴Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107, 117 (1971) (zoning as a segment of police power should not inflict great financial losses when the benefit to the public is negligible).

³⁵Kucera, *supra* note 29, at 7.

³⁶*Id.*

³⁷29 C.J.S. *Eminent Domain* § 6, at 178 (1965). See *School Town v. Heiney*, 178 Ind. 1, 98 N.E. 628 (1912); Kucera, *supra* note 29, at 5.

³⁸Kucera, *supra* note 29, at 5.

avoided the confusion of determining whether injury to property or property rights was caused by eminent domain or police power by statutorily providing for compensation to abutting landowners when their property rights are taken or destroyed, regardless of the source of the injury.³⁹

One exercise of police power that may affect property or property rights is zoning. Valid zoning restrictions may cause damage to property or property rights, but the property owner is not entitled to compensation.⁴⁰ Zoning is not a taking but only a regulation of property to prevent use detrimental to the public.⁴¹ As with other exercises of the police power, zoning is subject to the limitation of "reasonableness."⁴² A zoning ordinance will be considered valid and enforceable if its constitutionality is merely debatable.⁴³ In considering whether a zoning ordinance is unreasonable and thus unconstitutional, the courts look to a number of factors: the existing uses and zoning of nearby property; the extent to which property values vary; the extent to which the destruction of property values of the land owner promotes the health, safety, morals, or general welfare of the public; the relative gain to the public as compared to the hardship imposed upon the individual property owner; the suitability of the property for the zoned purpose; and the length of time the property has been vacant as zoned, considered in the context of land development in the vicinity of the subject property.⁴⁴

The issue of reasonableness of zoning frequently arises in two areas. If zoning is used to terminate a present use at a future time, often termed "timed zoning," the proposed zoning must not be arbitrary.⁴⁵ If the zoning in this context is arbitrary, there exists a "taking" of property, and the owner of such property

³⁹IND. CODE § 8-11-1-1 to -11 (Burns 1973). In at least one instance, Indiana statutorily recognizes that the rights of access, air, light, and view are property rights, and if such are "taken" by police power, the owner is entitled to compensation. *Id.* § 8-13-2-9. Texas has made provisions for compensation when property is taken by police power. Kucera, *supra* note 29, at 14.1.

⁴⁰1 NICHOLS § 1.42(10), at 1-189; See also Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107 (1971).

⁴¹Sackman, *The Impact of Zoning and Eminent Domain upon Each Other*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 107 (1971).

⁴²*Id.* at 116.

⁴³*Id.* at 117. See also 1 NICHOLS § 1.42(10), at 1-218, citing *La Salle Nat'l Bank v. County of Cook*, 12 Ill. 40, 145 N.E.2d 65 (1957).

⁴⁴1 NICHOLS § 1.42(10), at 1-219.

⁴⁵*Id.* at 1-207.

is entitled to compensation.⁴⁶ Another situation in which zoning may be unreasonable is where it is not feasible to use the land as it is zoned. If all statutory prerequisites for a variance have been met and there is a denial of a variance, there will be a "taking" under the constitutional definition.⁴⁷

In addition to the limitation of reasonableness, a condemnor may not use zoning as a device to depress land values shortly before such land is to be condemned.⁴⁸ This device is often termed "condemnation blight" and will be discussed in a later section of this Note.⁴⁹

C. Damages in Inverse Condemnation

The area involving compensation for the taking or injuring of property is filled with the misuse of damage terms and concepts.

1. *Use of the Term Damages.*—Damages, when used in the constitutional taking of land, involve the paying of compensation to the owner for the value of his land.⁵⁰ Unfortunately, the definition of damages for a constitutional taking of land has been confused with the definition of damages used in connection with tort liability.⁵¹

A problem exists particularly with the use of the term "consequential damages." If viewed in the purest sense, all damages are consequential.⁵² However, as defined by the Indiana Supreme Court, the legal definition of consequential damages is "damages, loss, or injury as do not flow directly and immediately from the act of the party, but only from some of the consequences or results of such acts."⁵³ Unfortunately, the term is used interchangeably

⁴⁶Id. at 1-207 to -208, citing *Kunz v. Waterman*, 258 Ind. 573, 283 N.E.2d 371 (1972); *Metropolitan Bd. of Zoning Appeals v. Sheehan Constr. Co.*, 313 N.E.2d 78 (Ind. Ct. App. 1974).

⁴⁷1 NICHOLS § 1.42(10), at 1-219 to -220, citing *Kunz v. Waterman*, 258 Ind. 573, 283 N.E.2d 371 (1972); *Metropolitan Bd. of Zoning Appeals v. Sheehan Constr. Co.*, 313 N.E.2d 78 (Ind. Ct. App. 1974).

⁴⁸1 NICHOLS § 1.42(10), at 1-221. See also *Sackman*, *supra* note 41, at 121. The Indiana Supreme Court has stated that where zoning is used to appropriate property for a specific purpose, there is a taking in a constitutional sense and compensation must be paid. *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), cert. dismissed, 379 U.S. 487 (1965). See also *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964).

⁴⁹See text accompanying notes 86-103 *infra*.

⁵⁰3 NICHOLS § 8.6, at 43.

⁵¹*Kucera*, *supra* note 29, at 28. Tortious damages on the other hand involve a wrong as an assessment of liability as well as all mitigating factors.

⁵²2A NICHOLS § 6.4432, at 6-171.

⁵³*Elson v. City of Indianapolis*, 246 Ind. 337, 346, 204 N.E.2d 857, 862 (1965).

for the whole spectrum of damages, thus rendering the term of little use in any study of damages to property.⁵⁴ For the purpose of discussion, this Note will use the term "direct" damages as those damages directly arising out of an injury and the term "consequential" damages as those which are indirect and which may be too far removed to be computable. Generally, where there is a "direct" injury to land, such as by a depreciation in value, compensation must be paid for the injury.⁵⁵ However, compensation for speculative or for consequential damage is generally not allowed.⁵⁶

Although an early Indiana case allowed recovery of consequential damages consisting of loss of profits,⁵⁷ the case is now doubtful authority.⁵⁸ Presently, under Indiana law, the courts are reluctant to allow consequential damages in any area.⁵⁹

2. *The Concept of Setoff.*—Setoff consists of those factors which mitigate the amount of damages recoverable by the land-owner.⁶⁰ When determining whether setoff will be applied against a landowner's compensation for a taking or injuring of property, a distinction is drawn between "general" and "special" benefits to the property.⁶¹ General benefits are those benefits that the land-owner shares with the public,⁶² while special benefits are those that are special and peculiar to the landowner's particular parcel of land.⁶³ Although in most situations "general" benefits cannot be set off,⁶⁴ "special" benefits can be set off without violating the constitutional mandate providing for "just compensation."⁶⁵

When the Indiana legislature originally enacted the Eminent Domain Act in 1905, no setoff for benefits of any nature was allowable, except in those limited instances where municipal corporations were involved.⁶⁶ However, when the Eminent Domain

⁵⁴2A NICHOLS § 6.4432, at 6-171.

⁵⁵*Id.* at 6-167.

⁵⁶4A *id.* § 14.245, at 14-252 to -254.

⁵⁷State v. Stabb, 226 Ind. 319, 79 N.E.2d 392 (1948).

⁵⁸See State v. Jordan, 247 Ind. 361, 366, 215 N.E.2d 32, 35 (1966).

⁵⁹See, e.g., State v. Heslar, 257 Ind. 307, 274 N.E.2d 261 (1971); Indiana & Mich. Elec. Co. v. Whitley County R.E.M. Corp., 312 N.E.2d 503 (Ind. Ct. App. 1974).

⁶⁰3 NICHOLS § 8.62, at 57.

⁶¹*Id.* § 8.6205, at 84.

⁶²*Id.* § 8.6203, at 66-68.

⁶³*Id.*

⁶⁴*Id.* § 8.6205, at 86-88, citing State v. Brubeck, 204 Ind. 1, 170 N.E. 81 (1932).

⁶⁵3 NICHOLS § 8.6205, at 86.

⁶⁶Act of Feb. 27, 1905, ch. 48, § 6, amended Act of Feb. 23, 1935, ch. 76, § 3. See Cleveland, Cincinnati & St. L. Ry. v. Smith, 192 Ind. 674, 138 N.E. 347 (1923); State v. Brubeck, 204 Ind. 1, 170 N.E. 81 (1932) (municipal corporations).

Act was amended in 1935, setoff for damages became allowable in certain situations.⁶⁷ As in almost all other states, Indiana now adheres to the general principle in allowing setoff for special benefits.⁶⁸

The terms "direct" and "consequential" damages and "setoff" also change distinctively when they are applied to total takings of property, partial takings of property, and situations where no actual taking occurs.

When there is a total taking, the owner will be able to recover the value of his land.⁶⁹ The payment for the value of the property is considered just compensation, and the owner usually will not be entitled to consequential damages.⁷⁰ Because the taking is constitutionally proscribed, the elements of setoff and mitigating circumstances are generally not allowed.⁷¹ In Indiana, a landowner's compensation is the fair market value of the parcel taken, plus the value of each separate estate or interest in the parcel, plus the fair market value of all improvements pertaining to that realty.⁷²

When there is a partial taking, the owner may not only recover for the actual taking but also may recover for damages occurring to the area remaining in his ownership, possession, and use.⁷³ These damages to the remainder are often termed "severance" damages.⁷⁴ The purported reason for allowing severance damages is that a partial taking is an exception to the "no consequential damages" rule in total takings.⁷⁵ The allowance for set-off is generally allowable only against the direct damages for the land taken.⁷⁶ Early Indiana statutory law did not provide setoff

⁶⁷The 1905 Act only allowed municipal corporations to assert setoff. However the 1935 amendment to the 1905 Act entitled the state, the county for public highway purposes, and municipal corporations for public use to assert setoff allowances. Act of Feb. 23, 1935, ch. 76, § 3, p. 230 (codified at IND. CODE § 32-11-1-6(5) (Burns 1973)). Only special benefits may be set off. *State v. Smith*, 237 Ind. 72, 143 N.E.2d 666 (1957).

⁶⁸3 NICHOLS § 8.6211(15), at 120.

⁶⁹*Id.* § 8.6, at 43.

⁷⁰4A *id.* § 14.1(1), at 14-6 (no consequential damages under "taking provisions"). See *City of Kokomo v. Mahan*, 100 Ind. 242 (1884). However, interest from the time of taking is considered an element of just compensation and is recoverable. *State Highway Comm'n v. Blackiston Land Co.*, 301 N.E.2d 663 (Ind. Ct. App. 1973).

⁷¹*Cf.* 3 NICHOLS § 8.62(2), at 60.

⁷²IND. CODE § 32-11-1-6 (Burns 1973).

⁷³4A NICHOLS § 14.1(3), at 14-31.

⁷⁴*Id.* at 14-33 (diminution in value of a remainder area by reason of severance therefrom of the parcel appropriated demands compensation).

⁷⁵4A NICHOLS § 14.2, at 14-46.

⁷⁶3 *id.* § 8.6211(15), at 120.

for severance damages.⁷⁷ However, many courts felt that a setoff allowance should be made when severance damages were sought.⁷⁸ In Indiana, setoff is allowed against the consequential damages to the remainder area and not against the direct damages for the land taken.⁷⁹

Where no actual taking of land is present but the land is damaged, recovery is based upon many variables. The primary factor is the nature of the state constitutional provisions and whether such provisions allow compensation for a "taking" or for a "taking or injuring."⁸⁰ A "taking and injuring" provision entitles the abutter only to damages that are peculiar to the abutter and not shared by the general public, except where other damages are specifically provided for by constitution or statute.⁸¹ Set-off of special benefits is almost universally allowed.⁸²

In states such as Indiana whose constitutions mandate compensation by finding that the nonpossessory special property rights of an abutter are "property" in the constitutional sense,⁸³ many authorities believe a "taking" occurs when a benefit passes to the public, as opposed to the destruction of a right with no benefit to the public.⁸⁴ When compensation is allowed, most states including Indiana, provide for setoff in the assessment of damages.⁸⁵

⁷⁷See Act of Feb. 27, 1905, ch. 48, § 6. See *State v. Brubeck*, 204 Ind. 1, 170 N.E. 81 (1932).

⁷⁸See *State v. Reid*, 204 Ind. 631, 635, 185 N.E. 449, 450 (1932).

⁷⁹3 NICHOLS § 8.6211(15), at 120.

⁸⁰4A *id.* § 14.1(1), at 14-6.

⁸¹2A *id.* § 6.45, at 6-312.

⁸²3 *id.* § 8.6210, at 106.

⁸³*School Town v. Heiney*, 178 Ind. 1, 98 N.E. 628 (1912) (a taking is an actual interference with or disturbance of property rights, not merely consequential). See generally 2 NICHOLS § 5.72(1), at 5-155 to -163; 29A C.J.S. *Eminent Domain* § 105(2), at 429 (1965). Indiana, as most other states with only a constitutional provision providing for compensation for a "taking" of property, holds that "property rights" are property in the constitutional sense. See *Weldon v. State*, 258 Ind. 143, 279 N.E.2d 554 (1972); *State v. Lovett*, 254 Ind. 27, 257 N.E.2d 298 (1970); *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Huff v. Indiana State Highway Comm'n*, 238 Ind. 280, 149 N.E.2d 299 (1958); *Burkam v. Ohio & M. Ry.*, 122 Ind. 344 (1889); *Ross v. Thompson*, 78 Ind. 90 (1881); *City of Cannelton v. Lewis*, 123 Ind. App. 473, 11 N.E.2d 899 (1953). An award of compensation is dependent upon a court finding that a "taking of property" occurred and this determination is within the court's discretion. Indiana allows the factfinder the determination of whether there has been a taking of property. 2 NICHOLS § 5.72(1), at 5-165; *Sackman, supra* note 11, at 18-19. See also *Beck v. State*, 256 Ind. 318, 268 N.E.2d 746 (1971).

⁸⁴See, e.g., L. ORGEL, *ORGEL ON VALUATION UNDER EMINENT DOMAIN* § 3, at 14 (2d ed. 1953).

⁸⁵IND. CODE § 32-11-1-6 (Burns 1973).

3. *Time of Taking.*—The determination of the "time of taking" of the property also poses a problem in the damage area. Traditionally, compensation for a taking in both eminent domain actions and inverse condemnation actions has been assessed at the date of taking, or more specifically the date of the filing of the action.⁸⁶ By statute, Indiana fixes the time for assessing compensation for the actual taking of land in eminent domain actions at the time notice is served on the landowner.⁸⁷ By Indiana statute and case law, the time for assessing compensation in inverse condemnation cases is also fixed as the date of service of notice.⁸⁸

In recent years, the time of assessing compensation has been questioned. As expansive condemnation programs are announced with regularity, a phenomenon called "condemnation blight" has occurred. Condemnation blight occurs when there are decreases in the values of properties in the area of an eminent domain project after the designation of land to be taken by the project.⁸⁹ Because individuals do not wish to make long-term use of property that they know will be taken by eminent domain, the property sits vacant, the income-producing ability declines, and the value of the property decreases. What may be termed a *de facto* taking has occurred between the announcement of the project and the actual date of taking.⁹⁰

When confronted with the problem of condemnation blight, the United States Supreme Court held that eminent domain actions by the federal government must exclude any depreciation in value caused by the prospective taking, measured from the date the Government was committed to the project.⁹¹ Many states are still grappling with the problem by legislation or judicial decision.

⁸⁶3 NICHOLS § 8.5(1), at 27-28. *See generally* 3 *id.* § 8.5(1)-(4).

⁸⁷IND. CODE § 32-11-1-6 (Burns 1973). *See* Schnull v. Indianapolis Union Ry., 190 Ind. 572, 131 N.E. 51 (1921); Fort Wayne & S.W. Traction Co. v. Fort Wayne & W. Ry., 170 Ind. 49, 83 N.E. 665 (1908).

⁸⁸IND. CODE § 32-11-1-12 (Burns 1973). *See* Elson v. City of Indianapolis, 246 Ind. 337, 204 N.E.2d 857 (1965); State Highway Comm'n v. Blackiston Land Co., 301 N.E.2d 663 (Ind. Ct. App. 1973).

⁸⁹*See generally* Dillon, *Condemnation Blight: Uncompensated Losses in Eminent Domain Proceedings—Is Inverse Condemnation The Answer?*, 3 PAC. L.J. 571 (1972).

⁹⁰Arnebergh, *supra* note 3, at 324. *See also* Sackman, *Condemnation Blight—A Problem in Compensability and Value*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 157 (1973) (discussion of distinction between *de facto* taking and condemnation blight).

⁹¹United States v. Virginia Elec. & Power Co., 365 U.S. 624, 636 (1961), discussed in Dillon, *supra* note 89, at 584-85. *See also* Stubbs, *The Date of Take—What Happened To It and What Affects It*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 261 (1975).

California is one state which has confronted the problem of condemnation blight with statutory provisions. California, like many other states with expansive public construction projects, became inundated with the problem of inverse condemnation cases pertaining to the decrease in property values prior to an actual taking in eminent domain.⁹² With public works projects so extensive as to require preparation years in advance of the actual initiation of a program, the California courts not only were faced with a possible "taking" of property in a constitutional sense, but also with the inherent unfairness of allowing property to depreciate to such a low value that the public projects were in essence being financed by the individual property owners directly affected. The tragedy of the situation manifested itself in the fact that the parties displaced were often of a low socio-economic status, which rendered them least likely to resist the taking, let alone bear the loss to their property.

Finally in 1971, an effort was made to rectify this situation and to construct the framework for uniform inverse condemnation suits dealing with damages precipitated by the announcement of a project.⁹³ The California legislature passed a statute that allows for a suit for compensation in damages when a public entity, including "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation"⁹⁴ having the power of eminent domain, establishes by resolution or ordinance the necessity to acquire particular parcels of land, and fails to initiate action within 6 months thereafter.⁹⁵ If action is not initiated within 6 months, an inverse condemnation action may be initiated by the owner of the parcel to require the taking of such parcel and payment of compensation.⁹⁶ These provisions not only provide just compensation for the landowner but allow the condemning entity the flexibility of revising or rescinding its plans within a 6-month period.

Pennsylvania has faced the complex ground of pre-taking damages through judicial decision. Under the Pennsylvania Constitution, compensation is allowable only when there is a "taking."⁹⁷ However, municipal corporations vested with the power of eminent

⁹²Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). The California court held that a physical entry was not required. Although finally resolved subsequent to the 1971 statutory provisions, the case originated prior to the legislative enactments.

⁹³CAL. CIV. PRO. CODE § 1243.1 (West 1972).

⁹⁴CAL. GOV'T. CODE § 811.2 (West 1966).

⁹⁵CAL. CIV. PRO. CODE § 1243.1 (West 1972).

⁹⁶*Id.*

⁹⁷PA. CONST. art I, § 10.

domain must compensate for injuries to land as well as for a mere taking.⁹⁸ As early as 1915, the Pennsylvania courts recognized that municipal corporations were liable for damages even when no taking occurred.⁹⁹ With the enactment of the Eminent Domain Code of 1964,¹⁰⁰ the state was placed on a par with other condemnors and the next progression in liability was easily made. In *Commonwealth's Crosstown Expressway Appeal*,¹⁰¹ the court logically extended the compensation for damages in nontaking eminent domain cases by corporations to state eminent domain proceedings which, after announcement for the need of particular tracts of land, had unreasonably delayed the actual condemnation proceedings. The court reasoned that the condemnor had unreasonably delayed the taking of the particular parcels and such delay had unjustly and substantially diminished the value of the property to be taken.

The Indiana courts have not yet faced the problem of assessing damages in either eminent domain proceedings or inverse condemnation prior to the time of notice of eminent domain actions. However, Indiana statutory law allowing for the announcement of long range eminent domain projects¹⁰² may lead entities possessing the power of eminent domain into the problem of condemnation blight. In *Indiana Toll Road Commission v. Jankovich*,¹⁰³ the Indiana Supreme Court held that the use of zoning to acquire airspace rights from property is a "taking" in the constitutional sense and compensation must be paid. Since it is arguable that there is little or no distinction between a taking by zoning prior to condemnation and condemnation blight, it seems likely that blight condemnation damages will be a feature of future Indiana law.

III. THE ABUTTER'S RIGHT OF ACCESS TO ADJOINING ROADS AND HIGHWAYS

While the foregoing general factors influence inverse condemnation as it effects the rights of abutting landowners, there

⁹⁸PA. CONST. art. X, § 4.

⁹⁹In Re Philadelphia Parkway, 250 Pa. 257, 95 A. 429 (1915).

¹⁰⁰PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1974).

¹⁰¹3 Pa. Commonwealth Ct. 1, 281 A.2d 909 (1971), noted in 46 TEMP. L.Q. 139 (1972).

¹⁰²IND. CODE § 8-13-7-1(b) (Burns 1973). The Indiana State Highway Commission must publish its estimated plans two fiscal years in advance.

¹⁰³244 Ind. 574, 193 N.E.2d 237 (1963), cert. dismissed, 379 U.S. 487 (1965). See note 48 *supra*. In *Art Neon Co. v. City & County of Denver*, 357 F. Supp. 466, 480 (D. Colo. 1973), the court stated: "Where the ordinance prohibits any use or where it prohibits all reasonable uses, there is a taking, and the Fifth Amendment comes into play and demands the payment of just compensation."

are special problems which directly affect the abutter to roads and highways.

A. Defining the Abutter's Right of Access

The "right to access" or "easement of access," as it was often termed, originated in early times when no fencing was present and travelers could traverse the countryside freely.¹⁰⁴ As civilization progressed and the need for improved roadways became apparent, landowners joined together and constructed their own roadways. These roads often became private "toll roads."¹⁰⁵ By the early 1900's, it could be stated that the right to access by an abutting owner was an incident to the land.¹⁰⁶ When property for highways was taken in early eminent domain actions, the taking went no further than an appropriation of the use, thus leaving the owner with the fee and rights incidental to that fee.¹⁰⁷ Therefore, as it exists today in many jurisdictions, the right of access is one incident to the land and protected by the court, rather than a right created by the court and subject to its discretion.¹⁰⁸ Such "easements of access" constitute property in the constitutional sense and require compensation when taken.¹⁰⁹ Even if the public takes the fee of the highway, most courts have held that property abutting the street has attached to it the easements of access, light, and air.¹¹⁰

In early Indiana case law, the courts held that the abutter owned the fee to the center of the road, subject to the easement of the highway, and therefore could use the public right of way so long as such use did not interfere with the public's enjoyment of the highway.¹¹¹ When the state began to acquire the fee in

¹⁰⁴Hannett, *Problems of Access in Eminent Domain*, NINTH INSTITUTE ON EMINENT DOMAIN 119 (1969).

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 120.

¹⁰⁷*Id.* at 121. See *Lostutter v. City of Aurora*, 126 Ind. 436, 26 N.E. 184 (1891); *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N.E. 761 (1886); *Ross v. Thompson*, 78 Ind. 90 (1881); *Huffman v. State*, 21 Ind. App. 449, 52 N.E. 713 (1899).

¹⁰⁸Hannett, *supra* note 104, at 121. See IND. CODE § 32-11-1-1 (Burns Supp. 1975).

¹⁰⁹2 NICHOLS § 5.72(1), at 5-155 to -163; 29A C.J.S. *Eminent Domain* § 105(2), at 429 (1965). See *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958); *Huff v. Indiana State Highway Comm'n*, 238 Ind. 280, 149 N.E.2d 299 (1958); *City of Cannelton v. Lewis*, 123 Ind. App. 473, 11 N.E.2d 899 (1953).

¹¹⁰3 NICHOLS § 10.222(2), at 369, citing *Decker v. Evansville Ry.*, 133 Ind. 493, 33 N.E. 349 (1892); *Haslett v. New Albany R.R.*, 7 Ind. App. 603, 34 N.E. 845 (1893).

¹¹¹E.g. *Huffman v. State*, 21 Ind. App. 449, 52 N.E. 713 (1899). See also

highways, the abutter's rights of access and of light, air, and lateral support were firmly entrenched.¹¹²

Although the abutter's *right* of access is not an issue today, the *amount* of access to which the abutter is entitled is an issue. In the early years, road systems were primitive, and abutting owners had access to all points abutting a road.¹¹³ After the invention of the automobile, public interest and safety increasingly demanded that access to well-traveled, high-speed roads be limited.¹¹⁴ The abutting owner found that his right to access at all points of his land adjoining the road had to give way for the benefit of the public.¹¹⁵ With public safety in mind, courts began to hold that an abutter was entitled to "reasonable access" instead of complete access.¹¹⁶ Although the abutter's right of access may be reasonably regulated in the public interest, regulation cannot be used for total deprivation of access without the state incurring liability for damages.¹¹⁷ If an abutting owner is denied access reasonably necessary for the enjoyment of his land, he is entitled to relief.¹¹⁸

If the abutter must travel a greater distance to reach his property, this inconvenience, known as circuitry of travel,¹¹⁹ is not compensable, so long as ample access to the abutter's land re-

Town of Ogden Dunes v. Wildermuth, 142 Ind. App. 379, 235 N.E.2d 73 (1968).

¹¹²Weldon v. State, 258 Ind. 143, 279 N.E.2d 554 (1972); State v. Lovett, 254 Ind. 27, 257 N.E.2d 298 (1970); Huff v. Indiana State Highway Comm'n, 238 Ind. 280, 149 N.E.2d 299 (1958); Burkan v. Ohio & M. Ry., 122 Ind. 344 (1889); Ross v. Thompson, 78 Ind. 90 (1881).

¹¹³Hannett, *supra* note 104, at 119.

¹¹⁴*Id.* at 126-27.

¹¹⁵2 NICHOLS § 5.72(1), at 5-164; Stubbs, *Access Rights of an Abutting Landowner*, FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 59, 80 (1963). See also Sauer v. City of New York, 206 U.S. 536 (1907). Generally, "[a]n owner of land abutting upon a public highway possesses an easement of access to the abutting highway at all points included within his frontage on such highway." Stubbs, *supra*, at 63-64. However, the abutter's right is subordinate to the right of passage of the public and is subject to reasonable regulation and restriction. *Id.* at 80. See also State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960); State v. Marion Circuit Court, 238 Ind. 637, 153 N.E.2d 327 (1958); Huff v. Indiana State Highway Comm'n, 238 Ind. 280, 149 N.E.2d 299 (1958).

¹¹⁶Moore, *Nature and Compensability of Access*, THIRD ANNUAL INSTITUTE ON EMINENT DOMAIN 1, 10 (1961). See Beck v. State, 256 Ind. 318, 268 N.E.2d 746 (1971).

¹¹⁷3 NICHOLS § 10.221(5), at 376-77.

¹¹⁸Sackman, *supra* note 11, at 20, citing United States v. Grizzard, 219 U.S. 180 (1911); Stubbs, *Access Rights of an Abutting Landowner*, FIFTH ANNUAL INSTITUTE ON EMINENT DOMAIN 59, 82 (1963).

¹¹⁹Hannett, *supra* note 104, at 126.

mains.¹²⁰ This is because the abutter suffers the same inconvenience as the general public, although to a greater degree.¹²¹

The courts in Indiana have echoed this development of the right of access and now hold that the abutter is only entitled to "reasonable access,"¹²² thus mere circuitry of travel is not compensable.¹²³ In Indiana, as in most states, compensation will only be afforded to those abutters who have either suffered an injury special and peculiar from that of the general public, or who have been denied reasonable access.¹²⁴

An abutter with a right of access is entitled to the actual enjoyment of that access. If the use of the street adjoining the abutter's property substantially deprives that abutter of the enjoyment of his easement, there has been a taking of his property rights.¹²⁵ A clear example of the use of a street interfering with the enjoyment of an abutter's easements to that street arose in *Eubank v. Yellow Cab Co.*¹²⁶ An Indianapolis city ordinance¹²⁷ allowed taxi cab companies to establish "cab stands" on the street immediately in front of the plaintiff's property. The constant noise, fumes, and disturbances detrimentally affected the plaintiff's business. The Indiana Court of Appeals held that since adjacent property owners had a right of access to the street, interferences with the right had to be compensated. The court stated that devoting the street to private purposes, in this case a cab stand, was a deprivation of the abutter's rights for which compensation must be paid. However, if a private street is taken for public purposes without interfering with the enjoyment of the abutter's easements, most courts hold that only nominal damages may be awarded.¹²⁸

¹²⁰ NICHOLS § 5.72(1), at 5-165. The taking of a preponderance of access, as long as ample access is left, is deemed to be a benefit to the public and a proper exercise of police power. Sackman, *supra* note 15, at 348. The question of ample access, however, is one of fact and therefore relegated to the factfinder. *Beck v. State*, 256 Ind. 318, 268 N.E.2d 746 (1971); Sackman, *supra* note 11, at 18-20.

¹²¹ Hannett, *supra* note 104, at 126-27 (when everyone is required to travel further, there exists a public inconvenience). See *State v. Hastings*, 246 Ind. 475, 206 N.E.2d 874 (1965).

¹²² *State v. Hastings*, 246 Ind. 475, 482, 206 N.E.2d 874, 877 (1965).

¹²³ *Id.*

¹²⁴ *State v. City of Terre Haute*, 250 Ind. 613, 618-19, 238 N.E.2d 459, 462 (1968).

¹²⁵ NICHOLS § 5.72(6), at 5-173 to -174. See *State v. Stefaniak*, 250 Ind. 631, 238 N.E.2d 451 (1958); *Brown v. State*, 211 Ind. 61, 5 N.E.2d 527 (1937).

¹²⁶ 84 Ind. App. 144, 149 N.E. 647 (1925).

¹²⁷ *City of Indianapolis, Ind., Ordinance 12, Jan. 15, 1923.*

¹²⁸ Sackman, *supra* note 11, at 15-16.

B. Problem Areas in the Abutter's Right to Access to Adjoining Roads and Highways

1. *Change of Grade.*—A change of grade of a street, resulting in either a raising or lowering of the street, is deemed an application of state police power to improve the street for the benefit of the public.¹²⁹ Consequently, the abutting owner is not entitled to compensation for damages to his premises by reason of the change of grade¹³⁰ unless there has been a partial taking, in which case the rules applicable to partial taking apply.¹³¹ The reasons for noncompensation for a changing of the grade of a street have been expressed as threefold: (1) There may be a damaging of property, but there is no actual taking (in those states which do not have "damage" clauses in their constitutions); (2) the right to change the street was paid for in the original taking; and (3) the governmental body is doing no more with the street than a private adjoining landowner could do with his land.¹³² Since the abutter's easements to light, view, and access are subordinate to the rights of the public, there is no compensation for infringement upon them by a change of grade.¹³³

The purpose of the change of grade need not be for improvement or safety of the street; rather it may be for the crossing of a railroad, or access to a bridge.¹³⁴ The weight of authority holds that even the removal of lateral support in cases of change of grade is not compensable.¹³⁵

¹²⁹2A NICHOLS § 6.4441, at 6-198; 5 *id.* § 16.1013(1), at 16-45, *citing* State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960).

¹³⁰2A NICHOLS § 6.4441, at 6-198 to -199; 5 *id.* § 16.1013(1), at 16-45. See Young v. State, 252 Ind. 131, 246 N.E.2d 377, *cert. denied*, 396 U.S. 1038 (1969); Brown v. State, 211 Ind. 61, 5 N.E.2d 527 (1937); State v. Patten, 209 Ind. 482, 199 N.E. 577 (1936); Morris v. City of Indianapolis, 177 Ind. 369, 94 N.E. 705 (1911); City of Valparaiso v. Adams, 123 Ind. 250, 24 N.E. 107 (1890); Davis v. City of Crawfordsville, 119 Ind. 1, 21 N.E. 449 (1888); Town of Rensselaer v. Leopold, 106 Ind. 29, 5 N.E. 761 (1885); City of Kokomo v. Mahan, 100 Ind. 242 (1884); Town of Princeton v. Gieske, 93 Ind. 102 (1883); City of Wabash v. Alber, 88 Ind. 428 (1882); City of Aurora v. Fox, 78 Ind. 1 (1881); Weis v. City of Madison, 75 Ind. 241 (1881); City of Terre Haute v. Turner, 36 Ind. 522 (1871); Baker v. Town of Shoals, 6 Ind. App. 319, 33 N.E. 664 (1893).

¹³¹2A NICHOLS § 6.4441(1), at 6-207.

¹³²Sackman, *supra* note 11, at 30. See also 5 NICHOLS § 16.1013(1), at 16-47.

¹³³2A NICHOLS § 6.4441(3), at 6-212.

¹³⁴*Id.* § 6.4441(6), at 6-215 to -217. See Morris v. City of Indianapolis, 177 Ind. 369, 94 N.E. 705 (1911) (grade was lowered for railroad crossing).

¹³⁵2A NICHOLS § 6.4441(6), at 6-218, *citing* City of Aurora v. Fox, 78 Ind. 1 (1881), and City of Delphi v. Evans, 36 Ind. 90 (1871). See Freig v. Gararo Co., 223 Ind. 342, 60 N.E.2d 288 (1945) (no compensation for loss of lateral support absent negligence in construction).

An area of particular hardship exists for those abutters who erect buildings to conform to the grade of the street and then are injured when such grade is changed.¹³⁶ If there are no statutory provisions for the compensation in this situation, the abutter will have no remedy.¹³⁷

An exception to the general rule denying compensation for injury caused by a change of grade exists where the injury is to a right special and peculiar to the abutter.¹³⁸ Although the cases pertaining to recovery for special injuries have split, some authorities think that the key to recovery for injuries sustained in a change of grade is whether the abutter owns the fee in the street.¹³⁹ In Indiana the general rule prevails: abutting property owners have no right to compensation for a change of grade in the street.¹⁴⁰ Although an early Indiana statute provided for compensation for change of grade,¹⁴¹ at present no statutes exist for compensation to an abutter for a change of grade not negligently done.¹⁴²

One author has stated that a cogent argument can be made for distinction between the change of grade from an established grade and a change of grade from an unimproved road. Only in the latter case would the abutter not be entitled to compensation because he should have expected that a grade would be established on an unimproved road sometime in the future.¹⁴³

¹³⁶See *Morris v. City of Indianapolis*, 177 Ind. 369, 94 N.E. 705 (1911).

¹³⁷2A NICHOLS § 6.4441(4), at 6-214 to -215. Indiana has no provisions for such compensation.

¹³⁸*Id.* § 6.4441(10), at 6-233, citing *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960); 5 *id.* § 16.1013(3), at 16-51. See also 30 C.J.S. *Eminent Domain* § 446, at 602.

¹³⁹2A NICHOLS § 6.4441(3), at 6-214.

¹⁴⁰*Brown v. State*, 211 Ind. 61, 5 N.E.2d 527 (1937); *State v. Patten*, 209 Ind. 482, 199 N.E. 577 (1936); *Randall v. Board of Comm'rs*, 77 Ind. App. 320, 131 N.E. 776 (1921); *Butler v. City of Kokomo*, 62 Ind. App. 519, 113 N.E. 391 (1916).

¹⁴¹Act of March 14, 1867, ch. 15, § 27 (obsolete).

¹⁴²The 1867 statute, *id.*, allowed compensation for a change of grade from an established grade. However, the statute applied only to cities, *City of Valparaiso v. Adams*, 123 Ind. 250, 24 N.E. 107 (1890), and not to towns, *City of Wabash v. Alber*, 88 Ind. 428 (1882); *Baker v. Town of Shoals*, 6 Ind. App. 319, 33 N.E. 664 (1893).

In 1911 provisions for compensation for a change of grade from an established grade were retained; however first, second, and third class cities were excepted. Ch. 221, § 1, [1911] Ind. Acts 539 (repealed 1969). Finally, in 1969, all previous statutes pertaining to change of grade compensation were repealed and superseded, with no such provisions existing today. IND. CODE § 19-8-16-39 (Burns 1974), repealing Act of March 11, 1911, ch. 221, § 1, [1911] Ind. Acts 539.

¹⁴³Sackman, *supra* note 11, at 33-34.

2. *Obstructions in the Highway.*—Although in most cases the general public may not maintain an action for an obstruction in the highway,¹⁴⁴ the abutter has a special interest and may recover for such obstructions.¹⁴⁵ Because an obstruction is a denial of access to an abutting owner, he has suffered a special injury.¹⁴⁶ Therefore, if a portion of a street is discontinued in front of the abutter's property so that access is impossible, he will be entitled to compensation.¹⁴⁷ However, it is an established principle that for an abutting property owner to recover for an obstruction or discontinuance of a street, his property must abut that part of the way which is discontinued or obstructed.¹⁴⁸ Furthermore, because recovery is based upon the premise that the abutter has suffered a special injury, the injury must be different from that of the general public.¹⁴⁹ Damages that are suffered by the public at large are normally never considered peculiar to an abutting owner.¹⁵⁰

¹⁴⁴The general public may prosecute for a public wrong. 3 NICHOLS § 10.221, at 362.

¹⁴⁵3 *id.* § 10.221, at 362, *citing* O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302 (1902); Cannelton v. Lewis, 123 Ind. App. 473, 111 N.E.2d 899 (1953). See also Indiana, B. & W. Ry. v. Eberle, 110 Ind. 542 (1886); Robinson v. Thraikill, 110 Ind. 117 (1886); City of Indianapolis v. Kingsbury, 101 Ind. 200 (1884).

¹⁴⁶2A NICHOLS § 6.4442(1), at 6-246, *citing* Brandenburg v. Hittel, 16 Ind. App. 224, 37 N.E. 329 (1894). Indiana allows recovery if the abutter has suffered a special injury. State v. Diamond Lanes, Inc., 251 Ind. 520, 242 N.E.2d 632 (1968). An improper use or obstruction of a street is a taking in the constitutional sense and requires compensation. 3 NICHOLS § 10.221(2), at 369, *citing* Decker v. Evansville, S. & N. Ry., 133 Ind. 493, 33 N.E. 349 (1892); Haslett v. New Albany R.R., 7 Ind. App. 603, 34 N.E. 845 (1893).

¹⁴⁷2A NICHOLS § 6.4442(1), at 6-246, *citing* Brandenburg v. Hittel, 16 Ind. App. 224, 37 N.E. 329 (1894). See also 39 C.J.S. Highways § 143, at 1085 (1944); Sackman, *supra* note 11, at 8.

¹⁴⁸2A NICHOLS § 6.4442(1), at 6-250.

¹⁴⁹3 *id.* § 10.221, at 362, *citing* O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302 (1902); City of Cannelton v. Lewis, 123 Ind. App. 473, 111 N.E.2d 899 (1952). See also Young v. State, 252 Ind. 131, 246 N.E.2d 377, cert. denied, 396 U.S. 1038 (1969); Northern Ind. Pub. Serv. Co. v. Vesey, 210 Ind. 338, 200 N.E. 620 (1936); Martin v. Marks, 154 Ind. 549, 57 N.E. 249 (1900); Pittsburgh, C. C. & St. L. Ry. v. Noftsger, 148 Ind. 101 (1897); People's Gas Co. v. Tyner, 131 Ind. 277 (1891); Dwenger v. Chicago & Grand Trunk Ry., 98 Ind. 153 (1884); Powell v. Bunger, 91 Ind. 64 (1883); Cummins v. City of Seymour, 79 Ind. 491 (1881).

¹⁵⁰Caito v. State, 301 N.E.2d 376 (Ind. Ct. App. 1973). However, Indiana appears to maintain a delicate balance between police power and recovery of special injuries. State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960). The latter is always subject to negation by the former.

Although states are in conflict as to whether there may be recovery for "temporary" injury to abutting property,¹⁵¹ most states, including Indiana, hold that there can be no recovery for mere temporary inconvenience.¹⁵² However, where the abutter suffers a special injury, different in kind and degree from the general public, no sound reason exists to bar recovery.¹⁵³ Damages have been awarded in some jurisdictions to an abutter if the project causing the temporary obstruction is delayed for an extended time because of negligence or unreasonable, unnecessary, arbitrary, or capricious acts or conduct by the one responsible for the obstruction.¹⁵⁴

A distinction between "permanent" and "temporary" obstructions is also made in assessing damages for an obstruction: the former is determined by the difference in value of the property with and without the obstruction; the latter is determined by the diminution in value of use of the land for the time period.¹⁵⁵ If the abutter has no remedy at law and if he has not been estopped, some courts have allowed the abutter to enjoin a wrongful use of a highway which resulted in special injuries to him because of an interference with his right of access.¹⁵⁶

An anomaly arises if the street is obstructed or discontinued at some point beyond the property of the abutter, or the flow of traffic is restricted by an obstruction at some point beyond the abutter's property. In these situations, the abutter may be damaged to a greater extent than the general public. Nevertheless, most courts still tend to treat this type of blockage separately¹⁵⁷ and hold that the abutter is not entitled to compensation if his property is otherwise accessible.¹⁵⁸ There is no right to compensation for an abutter left on a street with only one opening, referred

¹⁵¹Compare *Steinle v. City of Cincinnati*, 142 Ohio St. 550, 53 N.E.2d 800 (1944), with *Youngquist v. Hall*, 195 Minn. 79, 261 N.W. 874 (1935).

¹⁵²29A C.J.S. *Eminent Domain* § 113, at 462 (1965). See also *Papp v. City of Hammond*, 248 Ind. 637, 230 N.E.2d 326 (1967); *Sackman, supra* note 11, at 25, citing *Transportation Co. v. Chicago*, 99 U.S. 635 (1879).

¹⁵³2A NICHOLS § 6.4442(2), at 6-251.

¹⁵⁴*Id.* at 6-252 to -253.

¹⁵⁵39 C.J.S. *Highways* § 143, at 1086 (1944).

¹⁵⁶*Id.* at 1087. See *Lake Erie & W. R.R. v. Town of Boswell*, 137 Ind. 336, 36 N.E. 1103 (1894); *City of Kokomo v. Mahan*, 100 Ind. 242 (1884); *Burton v. Sparks*, 109 Ind. App. 531, 36 N.E.2d 962 (1941); *Michigan Cent. R.R. v. Hammond*, W. & E.C. Elec. Ry., 42 Ind. App. 66, 83 N.E. 650 (1908); *Lake Erie & W. R.R. v. Essington*, 27 Ind. App. 291, 60 N.E. 457 (1901) (cases involving interference of access by railroads).

¹⁵⁷2A NICHOLS § 6.4441(1), at 6-247 to -248.

¹⁵⁸See *id.* § 6.4443(3), at 6-257 to -258, citing *State v. Hastings*, 246 Ind. 475, 206 N.E.2d 874 (1965); *State v. Tolliver*, 246 Ind. 319, 205 N.E.2d 672 (1964); *Dantzer v. Indianapolis Union Ry.*, 141 Ind. 604, 39 N.E. 223 (1895).

to as a "cul-de-sac," even if there is a depreciation in the value of his property.¹⁵⁹ However, impressed by the hardship of not allowing damages when the obstruction is not in front of an abutter's property, some courts have awarded damages for depreciation in value of an abutter's property left on a cul-de-sac.¹⁶⁰ The Indiana courts that have allowed recovery for the cul-de-sac situation appear to have blended "special" injury and "denial of access" to develop recovery for denial of the access for any special purposes for which the property may be used.¹⁶¹ The test to determine damages for the cul-de-sac situation in Indiana generally requires an obstruction of the nearest intersection, or an obstruction that materially impairs access to the property, and specific injuries, different in kind and degree from that suffered by the public, which actually depreciate the market value of the property.¹⁶²

3. *Traffic Controls.*—Diversion of traffic,¹⁶³ installation of a median strip,¹⁶⁴ limitations as to modes and types of traffic, institution of one-way streets, installation of curbs or guardrails, and regulation of access by control of driveway permits or restrictions on parking and deliveries are all exercises of police power, and abutters are not entitled to compensation for damages because of the institution of such measures.¹⁶⁵ The resulting injury or circuitry of travel is *damnum absque injuria*,¹⁶⁶ with the abutter entitled to damages only if "ample" access were denied him.¹⁶⁷

¹⁵⁹2A NICHOLS § 6.4443(3), at 6-263, *citing* O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302 (1902). See State v. Diamond Lanes, Inc., 251 Ind. 520, 242 N.E.2d 632 (1968); State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960) (the abutter has no access beyond that which is necessary).

¹⁶⁰Sackman, *supra* note 11, at 10, *citing* O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302 (1902).

¹⁶¹State v. Tolliver, 246 Ind. 319, 205 N.E.2d 672 (1965) (the abutting owner of a steel prefabricating plant was allowed to recover for being left on a cul-de-sac because the access remaining to his property could not accommodate the length and weight of his steel trucks). See also State v. Geiger & Peters, Inc., 245 Ind. 143, 196 N.E.2d 740 (1964).

¹⁶²2A NICHOLS § 6.4443(3), at 6-268; Sackman, *supra* note 11, at 21. See State v. Tolliver, 246 Ind. 319, 205 N.E.2d 672 (1965).

¹⁶³2A NICHOLS § 6.4443(4), at 6-274, *citing* State v. Diamond Lanes, Inc., 251 Ind. 520, 242 N.E.2d 632 (1968). See State v. Cheris, 153 Ind. App. 451, 287 N.E.2d 777 (1972).

¹⁶⁴2A NICHOLS § 6.4443(4), at 6-274, *citing* Young v. State, 252 Ind. 131, 246 N.E.2d 377, *cert. denied*, 396 U.S. 1038 (1969). See State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960).

¹⁶⁵2A NICHOLS § 6.4443(4), at 6-274 to -294.

¹⁶⁶Sackman, *supra* note 15, at 335; Sackman, *supra* note 11, at 36, *citing* State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960).

¹⁶⁷State v. Diamond Lanes, Inc., 251 Ind. 520, 242 N.E.2d 632 (1968).

4. *Limited Access Highways.*—Indiana statutory law defines a limited access highway “as a highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land [have] only a limited right or easement of direct access, light, air, or view by reason of the fact that their property abuts upon such limited access facility or for any other reason.”¹⁶⁸

The distinction between conventional highways and limited access highways revolves around one basic theme. “While in the conventional public highway the abutter possesses private rights of ingress and egress, light, air, and access, distinct from those possessed by the public at large, no such rights are appurtenant to property of an abutter upon a limited access highway.”¹⁶⁹

An examination of the problems created by limited access highways upon abutter’s property should be divided into two areas: that in which a limited access highway is located on a new location and that in which a limited access highway is located on existing roads and highways. If a limited access road is constructed where no road existed before, the abutter may not recover damages by reason of lack of access to the new facility because no such right or easement existed before.¹⁷⁰ Although “severance” damages to the remainder of abutter’s property in a partial taking may be allowed,¹⁷¹ no such compensation will be paid if no right to access existed prior to the taking. If an abutter had a right to access on a street prior to its conversion into a limited access facility, denying such abutter “reasonable access” is a taking in the constitutional context and must be compensated.¹⁷²

Although a service road is provided with the limited access facility, many jurisdictions, including Indiana, hold that compensation may be obtained for abutters deprived of ingress and egress.¹⁷³ However, these jurisdictions place two restrictions upon awarding damages for denial of access: the injury suffered must be special and peculiar,¹⁷⁴ and mitigation will be allowed due to

¹⁶⁸IND. CODE §§ 8-11-1-1 to -11 (Burns 1973). See also 3 NICHOLS § 10.2211(2), at 386.

¹⁶⁹Jahr, *Compensable Damages Due To Construction of Limited Access Highways*, SECOND ANNUAL INSTITUTE ON EMINENT DOMAIN 77, 79 (1960).

¹⁷⁰3 NICHOLS § 10.2211(4), at 393; Jahr, *supra* note 169, at 85; Sackman, *supra* note 11, at 14.

¹⁷¹Jahr, *supra* note 169, at 83.

¹⁷²3 NICHOLS § 10.2211(1), at 381, citing State v. Geiger & Peters, Inc., 245 Ind. 143, 196 N.E.2d 740 (1964). See also Hannett, *supra* note 104, at 130.

¹⁷³3 NICHOLS § 10.2211(3), at 387, citing State v. Geiger & Peters, Inc., 245 Ind. 143, 196 N.E.2d 740 (1964).

¹⁷⁴Young v. State, 252 Ind. 131, 246 N.E.2d 377, cert. denied, 396 U.S. 1038 (1969).

the access to the service road.¹⁷⁵ By statute in Indiana, compensation may be paid for access, view, and light if property is obtained for limited access highways.¹⁷⁶ It also appears from case law that damages will be paid for a taking of access only if there is a denial of "reasonable" access needed for a specific purpose for which the property is used,¹⁷⁷ or the abutter suffers some special damages because of access to the service road.¹⁷⁸

C. Two Unusual Areas Which Affect Abutter's Rights

One unusual area affecting abutter's rights is that of partial takings. A partial taking, by its effect, creates an abutting property owner where there is a remainder. Traditionally, this "created" abutting property owner has been given a wider array of remedies than the "general" abutting property owner. When part of the tract of land is taken by eminent domain, just compensation to the owner includes damages to the remainder of the tract.¹⁷⁹ The accepted view is that the constitutional requirement for "just compensation" for "taking" includes, by inference, damage to the whole for any part taken.¹⁸⁰ Because of this treatment given to "partial takings," most courts have not been reluctant to award compensation for "access" when egress and ingress from the remainder area to the nearest highway has been rendered difficult.¹⁸¹ However, this liberal attitude in granting compensation has not been extended to general inaccessibility from a remainder area to surrounding neighborhood centers. Such an injury is not considered an injury different in kind from that suffered by the neighboring owners, even if the owner of the remainder is affected to a greater degree.¹⁸² The primary limiting factor in the compensation for damages to remainders is setoff for the benefits accruing to the owner caused by the taking.¹⁸³

¹⁷⁵3 NICHOLS § 10.2211(3), at 388. See *Young v. State*, 252 Ind. 131, 246 N.E.2d 377, cert. denied, 396 U.S. 1038 (1969) (compensation should only be allowed when there is an actual taking of land). But see *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 196 N.E.2d 740 (1964).

¹⁷⁶IND. CODE § 8-11-1-5 (Burns 1973).

¹⁷⁷*State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632 (1968).

¹⁷⁸*Tolliver v. State*, 246 Ind. 319, 205 N.E.2d 672 (1965).

¹⁷⁹4A NICHOLS § 14.21, at 14-49 to -52.

¹⁸⁰*Id.*

¹⁸¹Sackman, *supra* note 11, at 13, citing *Union R.R. Transfer & Stock Yard Co. v. Moore*, 80 Ind. 458 (1881).

¹⁸²Sackman, *supra* note 11, at 13-14.

¹⁸³See also the discussion of damages at notes 73-79 *supra* and accompanying text.

The second unusual area affecting abutters' rights is that of use of a highway for non-highway uses.¹⁸⁴ While non-highway use of a highway is not considered a violation of an easement or property right which is constitutionally protected from destruction without compensation, the injury differs so greatly from that to the rights of the public-at-large that the abutter is generally said to have experienced special and peculiar damages.¹⁸⁵

Although change of grade is normally not compensable, if there is interference with, or destruction of access, as a result of a change of grade from non-highway purposes, the abutter will be entitled to recovery.¹⁸⁶ The rule is the same even though the change of grade is legally authorized and consented to by the municipality.¹⁸⁷

IV. CONCLUSION

The study of the theory of inverse condemnation as it applies to adjacent property owners is important to the modern attorney. As public works continue to intrude into greater numbers of lives and property, there is an increased probability of uncompensated takings of land. The general practice attorney will be faced with the ever increasing likelihood that inverse condemnation cases will arise in his locality. Additionally, because of the greatly expanded scope of inverse condemnation cases, lawyers for public entities should be concerned about the unknown, unforeseeable, potential liability in connection with every public improvement.

CARL W. GROW

¹⁸⁴City of Colorado Springs v. Stark, 57 Colo. 384, 140 P. 794 (1914) (subway at streets crossing); Aldis v. Union Elevated R.R., 203 Ill. 567, 68 N.E. 95 (1903) (elevated railroad); Southwestern Tel. & Tel. Co. v. Smithdeal, 59 Tex. Civ. App. 377, 126 S.W. 942 (1910) (telegraph line).

¹⁸⁵2A NICHOLS § 6.444, at 6-295.

¹⁸⁶*Id.* § 6.4444(1), at 6-98. See Sackman, *supra* note 11, at 11-13, citing Butler v. City of Kokomo, 62 Ind. App. 519, 113 N.E. 391 (1916).

¹⁸⁷Sackman, *supra* note 11, at 12-13.

Recent Development

Constitutional Law—EQUAL PROTECTION—Indiana guest statute, which denies recovery by a nonpaying guest against a negligent host, held not violative of the equal protection clause of the fourteenth amendment nor of the Indiana Constitution.—*Sidle v. Majors*, 341 N.E.2d 763 (Ind. 1976).

In *Sidle v. Majors*,¹ the constitutionality of the Indiana guest statute was challenged. The Indiana Supreme Court held that the Indiana guest statute,² which denies recovery by a nonpaying motor vehicle guest against a negligent host, does not contravene the provisions of the Indiana Constitution nor violate the equal protection clause of the fourteenth amendment to the United States Constitution.³

In *Sidle*, the plaintiff was injured in an automobile accident that occurred while the plaintiff was a guest passenger in an automobile operated by the defendant. The plaintiff filed suit in the United States District Court for the Southern District of Indiana, alleging negligence and wanton or willful misconduct.⁴ The district court sustained the defendant's motion for summary judgment on the negligence count, relying on the guest statute. On appeal to the United States Court of Appeals for the Seventh Circuit, the plaintiff challenged the constitutionality of the Indiana guest statute, asserting that it violated the equal protection clause of the fourteenth amendment to the United States Constitution⁵

¹341 N.E.2d 763 (Ind. 1976).

²IND. CODE § 9-3-3-1 (Burns 1973).

³341 N.E.2d at 775.

⁴In the companion case to *Sidle*, *Dempsey v. Leonherdt*, 341 N.E.2d 763 (Ind. 1976), the plaintiff was injured under similar circumstances and filed suit in the Benton Circuit Court, alleging negligence and willful and wanton misconduct. In the *Dempsey* case, prior to trial, the trial court entered a ruling declaring the Indiana guest statute unconstitutional as violative of the equal protection clauses of the United States and Indiana Constitutions.

⁵U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and article 1, sections 12⁶ and 23⁷ of the Indiana Constitution. The Seventh Circuit certified to the Indiana Supreme Court the question of whether the Indiana guest statute contravened either article 1, section 12, or article 1, section 23 of the Indiana Constitution.⁸ In the opinion written by Justice Prentice, the court held the Indiana guest statute constitutional.⁹

The guest statute provides that the operator of a motor vehicle shall not be liable for injury or death caused to a nonpaying guest passenger unless the injury or death was caused by the wanton or willful misconduct of the operator.¹⁰ Two determinations are necessary in order to ascertain whether the guest statute will bar recovery. The first is whether the injured person falls within the definition of nonpaying guest. Monetary payment itself is not the determining factor. In *Liberty Mutual Insurance Co. v. Stitzle*,¹¹ the Indiana Supreme Court held that the intention of the parties should be considered in deciding whether a guest relationship existed. If the purpose of the trip was primarily social, the injured party was still a nonpaying guest even though the host had received some monetary benefit. If the trip was essentially for business purposes and the host received substantial benefit, the injured guest was a paying guest even though no payment in the strict sense had been made. In a group of cases related to whether a guest had made payment, the Indiana Court of Appeals has considered the "gas and oil" payment problem. In *Lawson v. Cole*¹² and *Kempin v. Mardis*,¹³ the court held

⁶IND. CONST. art. 1, § 12 provides:

All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay.

⁷IND. CONST. art. 1, § 23 provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

⁸341 N.E.2d at 765-66.

⁹*Id.* at 775. After receiving the Indiana Supreme Court's opinion, the Seventh Circuit held the Indiana guest statute does not contravene the fourteenth amendment. — F.2d — (7th Cir. 1976).

¹⁰IND. CODE § 9-3-3-1 (Burns 1973) provides:

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.

¹¹220 Ind. 180, 41 N.E.2d 133 (1942).

¹²124 Ind. App. 89, 115 N.E.2d 134 (1953).

¹³123 Ind. App. 546, 111 N.E.2d 77 (1953).

that a passenger who paid for the host's gas and oil expenses could recover for ordinary negligence and was not barred by the guest statute. In a case where gas and oil expenses were *shared*, however, the court held that the passenger was a "guest" and had to prove the host's willful or wanton behavior to recover.¹⁴ The court of appeals, in *Ott v. Perrin*,¹⁵ held that a regular exchange of rides is not covered by the guest statute and an injured passenger could recover for ordinary negligence.

The second factor is a determination of the degree of misconduct involved. Ordinary negligence alone on the part of the host will bar the nonpaying passenger's recovery under the guest statute.¹⁶ For the nonpaying guest to recover, willful or wanton conduct by the host is necessary. In order to be willful or wanton, the conduct must have been pursued with knowledge and indifference that an injury to the guest was probable.¹⁷

A guest statute was first enacted in Indiana in 1929 and was amended in 1937.¹⁸ Prior to the enactment of a guest statute, Indiana case law held that a nonpaying passenger could recover from his host for ordinary negligence.¹⁹ About half of the states enacted guest statutes similar to Indiana's between 1927 and 1939.²⁰ The early major challenge to the constitutionality of guest statutes occurred in *Silver v. Silver*,²¹ in which the United States Supreme Court upheld the validity of the Connecticut guest statute. It should be noted that *Silver* concerned a challenge only to a distinction made between motorcars and other conveyances. During the years following the *Silver* decision, with the notable exception of Kentucky,²² state courts generally upheld their guest statutes on the authority of *Silver*.²³ However, since 1973 at least seventeen cases challenging the constitutionality of guest statutes have been litigated in state courts of last resort. Eight jurisdictions have found their guest statutes violative of equal protection;²⁴ nine jurisdictions have upheld their guest stat-

¹⁴Albert McGann Sec. Co. v. Coen, 114 Ind. App. 60, 48 N.E.2d 58 (1943).

¹⁵116 Ind. App. 315, 63 N.E.2d 163 (1945).

¹⁶Blair v. May, 106 Ind. App. 599, 19 N.E.2d 490 (1939).

¹⁷Bedwell v. DeBolt, 221 Ind. 600, 50 N.E.2d 875 (1943); Brueckner v. Jones, 146 Ind. App. 314, 255 N.E.2d 535 (1970).

¹⁸Ch. 201, § 1 [1929] Ind. Acts 679, as amended ch. 259, § 1 [1937], 1229 (codified at IND. CODE § 9-3-3-1 (Burns 1973)).

¹⁹Munson v. Rupker, 96 Ind. App. 15, 148 N.E. 169 (1925).

²⁰341 N.E.2d at 767.

²¹280 U.S. 117 (1929).

²²Ludwig v. Johnson, 243 Ky. 539, 49 S.W.2d 350 (1932).

²³341 N.E.2d at 768.

²⁴Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); Laakonen v. Eighth Judicial Dist.

utes against an equal protection attack.²⁵ In *Sidle* Indiana became the tenth state since 1973 to uphold its guest statute.

The standard of review used by a court in handling a case involving a constitutional challenge is a significant factor in the outcome of the case. The equal protection clause of the fourteenth amendment²⁶ to the United States Constitution, and article 1, section 23²⁷ of the Indiana Constitution both prohibit the distribution of extraordinary burdens or benefits to any person or group within society. However, they do not remove from the legislature all power to classify.²⁸ Instead, the classifications created by the statutes must meet certain tests. When a suspect classification is made, or a fundamental right is at stake, a compelling state interest must be shown to justify the classification.²⁹ When these factors are not present, the standard is less clear. Some cases hold that legislation is valid upon a showing that the classification is not arbitrary or unreasonable.³⁰ Other and more recent cases require a "fair and substantial" relation be shown to exist between the classification and its purpose to withstand an equal protection challenge.³¹

In *Sidle*, the court was conservative in its selection of a standard of review. The plaintiff argued that the right to bring an action for common law negligence was "fundamental"; therefore, the burden of proof shifted to the defendant to show a compelling state interest upholding the statutory classification. The court rejected this contention,³² relying on the statement from

Court, 538 P.2d 574 (Nev. 1975); *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974); *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

²⁵White v. Hughes, 519 S.W.2d 70 (Ark. 1975); Richardson v. Hansen, 527 P.2d 536 (Colo. 1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 86 (1975); Duerst v. Limbocker, 525 P.2d 99 (Ore. 1974); Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); Cannon v. Oviott, 520 P.2d 883 (Utah 1974).

²⁶See note 5 *supra*.

²⁷See note 7 *supra*.

²⁸Dandridge v. Williams, 397 U.S. 471 (1970).

²⁹San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969).

³⁰Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961). See also *Board of Comm'r's v. Plan Comm'n*, 330 N.E.2d 92 (Ind. 1975); Chaffin v. Nicosia, 310 N.E.2d 867 (Ind. 1974).

³¹Johnson v. Robison, 415 U.S. 361 (1974); Reed v. Reed, 404 U.S. 71 (1971); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). See also Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

³²341 N.E.2d at 766.

*San Antonio Independent School District v. Rodriguez*³³ that fundamental rights are those which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms. Instead, in determining whether the classifications under the Indiana guest statute were constitutional, the court ostensibly applied a combination of the "reasonableness" and "fair and substantial" relationship tests.³⁴ Although the court stated that it was using both standards of review, a careful analysis of the opinion suggests that "reasonableness" was the standard actually used. When a court chooses between low scrutiny ("reasonableness") or high scrutiny ("compelling state interest"), with very few exceptions, this selection is determinative of the outcome of the case. A middle ground called the "fair and substantial" relationship test as enunciated in *Reed v. Reed*,³⁵ has been used by Indiana courts in *Haas v. South Bend Community School Corp.*³⁶ and in *Indiana High School Athletic Association v. Raike*.³⁷ In *Raike* the Indiana Court of Appeals adopted what is known as "sliding scale analysis." Under this method, a statute may be found invalid under the equal protection clause even though *some* reason may exist to justify the classification. As the right becomes more fundamental, or the class more suspect, greater reason must be given to justify the statutory classification. The standards set forth in *Reed*, *Haas*, and *Raike* represent a middle ground between the traditional high and low scrutiny standards. They permit a meaningful review of classifications under the equal protection clause without the often outcome-determinative choice between high and low scrutiny.

In order to determine a statute's constitutionality under the equal protection clause, the purpose of the statute must first be ascertained. Since the Indiana guest statute neither expressed a purpose in its text nor provided legislative history from which a

³³411 U.S. 1 (1973).

³⁴341 N.E.2d at 767. The court emphasized that there is a presumption of constitutionality and the burden is upon the plaintiff to show the contrary.

³⁵In *Reed*, Chief Justice Burger, speaking for a unanimous court, stated that the equal protection clause of the fourteenth amendment does not deny the states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to objectives of the statute. A classification

[m]ust be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

404 U.S. at 76, quoting from *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

³⁶289 N.E.2d 495 (Ind. 1972).

³⁷329 N.E.2d 66 (Ind. Ct. App. 1975).

purpose might be ascertained, the court determined the statutory purpose from a consideration of what the court perceived the logical effects of the statute might be.³⁸ The court perceived and considered three "purposes." The fostering of hospitality by insulating generous drivers from lawsuits initiated by ungrateful guests and the elimination of the possibility of collusive lawsuits, are traditionally attributed to guest statutes by courts in other jurisdictions.³⁹ The third purpose, protection against the "benevolent thumb syndrome," was one not suggested by any previous litigation but one which the Indiana court perceived as "a very likely legislative policy behind our guest statute"⁴⁰ The "benevolent thumb syndrome" is the purported belief that in automobile guest suits, the jurors will assume that the real defendant is an insurance company and thus the jurors will weigh their "benevolent thumb" along with the evidence of the defendant's guilt.⁴¹ Since the relationship between the statutory classifications and the statutory purposes are crucial in a fourteenth amendment attack, it should be noted that the entity which established the purposes of the statute has substantial control over the statute's ultimate constitutionality. The legislature had not set forth the purposes of the Indiana guest statute examined in *Sidle*. The Indiana court borrowed two purposes traditionally used by courts in other jurisdictions and also created the "benevolent thumb syndrome" as a new judicial doctrine for Indiana.

Having identified and discussed the purpose of the statute, the court then had to decide if the classification of paying versus nonpaying guest bore the requisite relationship to those purposes. The first statutory purpose of fostering hospitality by protecting hosts from lawsuits by ungrateful guests can be more clearly analyzed by examining hospitality and ingratitude separately. The Indiana court justified the disparate treatment accorded paying versus nonpaying guests in the interest of promoting hospitality by analogy to an argument made in *Brown v. Merlo*.⁴² In *Brown* the California Supreme Court acknowledged the reasonableness of requiring a higher standard of care for paying passengers than for nonpaying ones. The Indiana court retorted that there is no basic distinction between *raising* a standard of care for persons within a given class and *lowering* the standard for those not within that class.⁴³ The distinction

³⁸341 N.E.2d at 768.

³⁹*Id.*

⁴⁰*Id.* at 771.

⁴¹*Id.* at 772.

⁴²8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). This case, which held the California guest statute unconstitutional, began the recent series of cases in which guest statutes have been challenged in state courts.

⁴³341 N.E.2d at 769.

which the Indiana court did not appear to consider is that the lowered standard of the Indiana guest statute completely deprives the nonpaying passenger of his remedy for negligent injury. It should also be noted that the recent supreme court decisions overturning various tort immunity doctrines undermine the promotion of hospitality as a valid statutory purpose. In recent cases Indiana has abolished the doctrines of interspousal immunity,⁴⁴ charitable immunity,⁴⁵ and governmental immunity.⁴⁶ However, the court pointed out that these immunities were judicially created and, therefore, appropriately subject to judicial repeal. The immunity afforded by the guest statute to host drivers against negligence claims by nonpaying guests was created by the legislature and was arguably not within the court's province to abolish.⁴⁷

The second part of the hospitality purpose is preventing ingratitude. The court justified the prevention of ingratitude as a legitimate statutory purpose on the basis of a sentimental discussion of the tolerance one bears toward the human frailties of one's family and friends.⁴⁸ A number of other cases, including *Brown and Primes v. Tyler*,⁴⁹ have noted that there is no affront to hospitality when one sues his host's insurer. Since the *Silver* decision, liability insurance coverage has expanded fourfold.⁵⁰ Indiana requires proof of financial responsibility in the amount of \$15,000 per person, and \$30,000 per accident, but only after the first accident.⁵¹ The Indiana court rejected the argument that the widespread availability of liability insurance has reduced the possibility that a guest suit is based on ingratitude. The court noted that liability insurance is not a condition precedent to the operation of a motor vehicle in Indiana and that the guest's claim is not necessarily limited to the amount of the host's insurance.⁵² Therefore, the guest statute is still a reasonable way to prevent ungrateful guests from bringing suit. Regardless of which side of the liability insurance argument a particular court accepts, the relevance of liability insurance availability to the con-

⁴⁴Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972).

⁴⁵Harris v. Young Women's Christian Ass'n, 250 Ind. 491, 237 N.E.2d 242 (1968).

⁴⁶Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972).

⁴⁷341 N.E.2d at 770.

⁴⁸*Id.* at 771.

⁴⁹43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

⁵⁰Compare Elsbree & Roberts, *Compulsory Insurance Against Motor Vehicle Accidents*, 76 U. PA. L. REV. 690 (1928), with U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY (1970).

⁵¹IND. CODE § 9-2-1-15 (Burns 1973).

⁵²341 N.E.2d at 769. The court also noted that the defendant faces the possibility of cancellation of his insurance or a substantial increase in his insurance premiums.

stitutionality of a guest statute should be questioned. The presence or absence of liability insurance in any specific tort case bears no relationship to the ultimate guilt or innocence of the defendant. Furthermore, the argument that a guest is really suing the host's insurer rather than the host himself is an invalid argument in that the majority of states have no "direct action statute" which legally permits a guest to directly sue the insurer.

The second purpose the Indiana court used in upholding the guest statute was the elimination of the possibility of collusive lawsuits. The court found that the guest statute was a reasonable way to prevent collusive lawsuits because the court perceived no reasonable alternative means of distinguishing bona fide damage claims from fraudulent ones, short of full-blown litigation.⁵³ The court acknowledged the problem of overinclusion in our guest statute—those with legitimate damage claims are barred from suit along with those having fraudulent claims—but justified the overinclusion because it held there were no alternatives short of litigation. A comparison with the reasoning of the Supreme Court of Ohio in *Primes v. Tyler*⁵⁴ is appropriate in analyzing the anticollusion purpose. Ohio's guest statute⁵⁵ is virtually identical to Indiana's. Of the many recent guest statute cases, *Primes* is the most independently reasoned. All of the other recent guest statute cases⁵⁶ were decided in terms of their compatibility with the *Brown* decision. Because of differences between Indiana law and California law, many of the *Brown* rationales were not applicable to *Sidle*.⁵⁷ In *Primes* the Supreme Court of Ohio held that the prevention of fraudulent claims was not "suitably furthered" by the guest statute nor by the differential treatment accorded to paying or nonpaying guests.⁵⁸ That court relied on the reasoning used in *Jimenez v. Weinberg*.⁵⁹ *Jimenez* involved a statutory disparity in eligibility between two classes of illegitimate children

⁵³341 N.E.2d at 771.

⁵⁴43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

⁵⁵OHIO REV. CODE ANN. § 4515.02 (Pages 1973), the Ohio guest statute, reads:

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

⁵⁶See notes 24 & 25 *supra*.

⁵⁷341 N.E.2d at 769. The court noted that the California statute distinguishes between automobile guests and all other guests. The Indiana statute is applicable to motor vehicle guest passengers.

⁵⁸331 N.E.2d at 727.

⁵⁹417 U.S. 628 (1974).

who might apply for social security benefits. The alleged purpose of denying benefits to the statutorily excluded subclass of illegitimate was to prevent spurious claims.⁶⁰ The United States Supreme Court recognized that preventing spurious claims is a legitimate governmental interest, but found that conclusively denying benefits to one subclass was a denial of equal protection because the classification was not reasonably related to the prevention of spurious claims.⁶¹ Persons in the statutorily benefited class could make fraudulent claims as easily as could persons in the statutorily excluded class. In *Primes* the Ohio court applied the *Jimenez* reasoning and found that the guest statute did not prevent fraudulent claims because nonpaying motor vehicle guests could easily avoid the guest statute's bar to recovery simply by presenting a collusive claim that he paid for the ride or that the driver was guilty of willful or wanton misconduct.

The Indiana Supreme Court itself made a most persuasive argument against the wholesale denial of a remedy to an entire class of negligently injured persons in *Brooks v. Robinson*.⁶² In that case the court abolished interspousal immunity, an area in which collusion is even more plausible than in the guest-host situation. The court reasoned that the retention of the interspousal immunity doctrine would require "the blanket assumption that our court system is so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband-wife tort litigation is to summarily deny all relief to this class of litigants."⁶³ Absent the arbitrary bar of the guest statute, the plaintiff would still be subject to extensive pretrial discovery, cross-examination, the assumption of risk doctrine, and the contributory negligence doctrine. The host would be subject to co-operation clauses in his insurance policy and could possibly lose his driver's license as a result of the accident. Both guest and host would be subject to suit for defrauding the insurance company or for committing perjury.

The third purpose of the Indiana guest statute is the prevention of the "benevolent thumb syndrome." The Indiana court created this doctrine as an attempt to justify the guest statute and therefore prevent the escalation of liability insurance premiums which might occur if juries improperly relied upon their assumption that the host was insured. Since the presence or absence of liability insurance is legally irrelevant to the defendant's personal liability in a tort action, how can the protection of liability insurance rates be considered a valid purpose of the statute?

⁶⁰*Id.* at 634.

⁶¹*Id.* at 636-37.

⁶²259 Ind. 16, 284 N.E.2d 794 (1972).

⁶³*Id.* at 21.

In *Sidle* the constitutionality of the Indiana guest statute was attacked as violating article 1, section 12 of the Indiana Constitution,⁶⁴ which provides that every person "shall have remedy by due course of law" in the courts of the state. The court upheld the guest statute's constitutionality under article 1, section 12.⁶⁵ The court distinguished the Indiana guest statute from guest statutes which had been declared unconstitutional in cases arising under Kentucky⁶⁶ and Oregon⁶⁷ constitutional provisions similar to article 1, section 12 of the Indiana Constitution. Oregon's statute precluded all actions for deaths and injuries sustained by guest passengers, and Kentucky's statute precluded all actions for guest passenger injuries and deaths, except those brought about by intentional acts, whereas Indiana's statute preserved the right to recover for deaths and injuries resulting from wanton or willful misconduct.⁶⁸

The Indiana court dealt only briefly with "irrebuttable presumption," a doctrine which may be significant in future guest statute challenges in other jurisdictions. In *Primes* the Supreme Court of Ohio found that their guest statute violated the Ohio Constitution because the guest statute conclusively precluded a "remedy by due course of law" by imposing an "irrebuttable presumption" that a lawsuit filed by a nonpaying guest is collusive or ingratuitous when the presumption is not necessarily true.⁶⁹ The Ohio court relied on *Vlandis v. Kline*,⁷⁰ in which a Connecticut statute imposed against out-of-state college students an irrebuttable presumption of nonresidency for the duration of their college careers. Many students became Connecticut residents while students, but the statute prevented any change in nonresident status. The United States Supreme Court struck down as a denial of due process,⁷¹ the presumption which the state claimed was necessary to prevent out-of-state students from asserting Connecticut residence merely to obtain lower tuition rates. A number of other Supreme Court cases have held irrebuttable presumptions to be a

⁶⁴See note 6 *supra*.

⁶⁵341 N.E.2d at 775.

⁶⁶Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932).

⁶⁷Stewart v. Houk, 127 Ore. 589, 271 P. 998 (1928).

⁶⁸341 N.E.2d at 773. The Indiana court relied on *Gallegher v. Davis*, 7 W.W. Harr. 380, 183 A. 620 (Del. Super. Ct. 1936), in which Delaware upheld a guest statute against a "due course of law" attack. The Delaware court noted that such constitutional provisions are to prevent unreasonable and arbitrary deprivation of rights, but that a guest statute having a "wilful or wanton" savings clause is not such a deprivation.

⁶⁹331 N.E.2d at 728.

⁷⁰412 U.S. 441 (1973).

⁷¹*Id.* at 451.

denial of due process of law.⁷² One recent Supreme Court case, not considered by the Ohio Court in *Primes*, may modify the holdings in "irrebuttable presumption" cases. *Weinberger v. Salfi*⁷³ seems to exclude three types of legislation from the purview of the irrebuttable presumption doctrine: (1) social welfare legislation, (2) legislative efforts to regulate business, and (3) other areas requiring judicial involvement in the legislative function in a degree which the courts have resisted except in the most unusual situations. The guest statute is not social welfare legislation. It is not regulation of business. Nor does it seem to fall into the third category. That area seems to be directed at matters such as foreign and military affairs and political questions where the courts usually take a hands-off approach. Therefore, under the most recent authority, the Indiana guest statute appears to deny due process as well as denying equal protection of the laws to non-paying guests.

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⁷²See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), in which the Court invalidated a rule of the Cleveland Board of Education which required pregnant teachers to stop teaching by the fifth month of pregnancy, regardless of actual physical condition. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court concluded that an Illinois statute which presumed an unwed father to be unfit as a guardian of his children, and afforded no hearing at which this presumption could be challenged, denied the father due process of law.

⁷³422 U.S. 749 (1975).

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